United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

76-1404

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

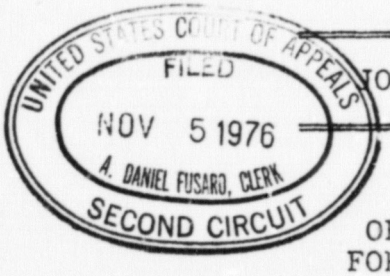
Plaintiff-Appellee,

-against-

MARI-ANN DANISE,
HARRY LEVINE BENSON, and
HERBERT KAMINSKY,

Defendants-Appellants.

Docket No. 76-1404



JOINT APPENDIX TO APPELLANTS' BRIEFS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARI-ANN DANISE
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

GILBERT EPSTEIN, ESQ.,
Attorney for Appellant
HARRY LEVINE BENSON
100 Church Street
New York, New York 10007
(212) 962-1564

GRETCHEN WHITE OBERMAN, ESQ.,
Attorney for Appellant
HERBERT KAMINSKY
277 Broadway
New York, New York 10007
(212) 267-7637

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

Docket Entries 1

Indictment 4

Court's Charge 9

Minutes of May 10, 1976 54

Letter to Court, dated May 13, 1976 58

Letter to Court, dated May 21, 1976 60

Subpoena Duces Tecum to Hans Buhler, dated May 20, 1976 62

Swiss Police report on Hans Buhler, turned over to defense May 20, 1976 63

Swiss Investigator's report:
re Hans Buhler, dated May 19, 1976 66

English translation of May 19 report 70

Affidavit of Gilbert Epstein, Esq.:
re Swiss investigator's oral report on interview of Werner Barth 74

Swiss investigator's report, dated May 28, 1976:
re Interview with Werner Barth 75

English translation of May 28 report 78

Defense motion to depose Werner Barth, dated June 22, 1976 82

Memorandum Decision, Endorsed on motion papers, dated July 13, 1976 ..... 86a

Subpoena Duces Tecum served on United States Customs Bureau, dated May 27, 1976 87

Defense motion to set aside verdict 88

Minutes of May 27, 1976:
re Defense motion for a continuance to depose Werner Barth 98

Letter to Government:
re Request for Buhler's Customs Declaration 108

Customs Declaration of Hans Buhler, Sr. 109

Legislative History of 1956 Amendment of 18 U.S.C. §2314,
(1956 U.S. Code Cong. & Admin. News, pp. 3036 et seq.) 111

Swiss Investigator's report:
re Hans Buhler, Sr. 115

Defense request to charge on inferences from false testimony 117

Minutes of May 20, 1976:
re Subpoenas to U.S. Customs 118

Government Exhibit 4: Copy of receipt for Swiss bank check
in the amount of 510,000 Swiss Francs 132

Defense Exhibit E: Agreement between Brito and Fuzer to
divide $15,000 commission 133

FBI report, dated May 26, 1975:
re Interview with Hans Buhler 134

Minutes of Colloquy:
re Admission of other crimes evidence 135

Minutes of Counsel's motion to dismiss 142

Excerpts from Government opening and summation:
re Ownership of the gems 145

BEST COPY AVAILABLE

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT JUDGE TENNEY 75 CRIM. 538.

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Jeremy G. Epstein, AUSA. 791-1938
1. HARRY LEVINE BENSON 2. HERBERT KAMINSKY 3. MARI-ANN DANISE	
	For Defendant: (2)Jay Goldberg,Esq. 299 Bway,N.Y.C.

(12) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 2 mailed	Clerk							
J.S. 3 mailed	Marshal							
Violation	Docket fee							
Title 18								
Sec. 371, 1343 & 2314								
Mail fraud.(Ct.2)								
Interstate transp. of stolen property.(Ct.3)								
Consp. so to do.(Ct.1)								
(Count Three)								

DATE	PROCEEDINGS
6-5-75	Filed indictment. B/W ordered. as to Benson. Gagliardi,J.
6-5-75	B/W issued.
6-16-75	Benson- No plea entered.
	Kaminsky(atty. present) Pleads not guilty. Bail fixed at $10,000. cont
	Danise(atty. present) Pleads not guilty. Bail fixed at $25,000. cont'd
	Case assigned to Judge Tenney for all purposes. Gagliardi,J.
6-19-75	Bench Warrant issued-Deft. Harry L. Benson.
06-23-75	Filed notice of appearance of atty. for deft. Herbert Kaminsky.
08-01-75	ALL DEFTS-filed magistrate's orig. papers: docket entry sheets(3), criminal complaint, magistrate warrant of arrest, disposition sheet, notice of appearanee and appearance bonds(2).
08-15-75	Filed Govt.'s notice of readiness for trial.

-over-

DATE	PROCEEDINGS
05-07-76	Deft. Harry Levine Benson-deft. is directed to obtain counsel by 6-10-76 and to appear before the Court 6-10-76 in room 705 bail fixed in the sum of $150,000. PRB secured by 10% is continued and deft. is to report daily to the pretrial agency. Tenney,J.
05-12-76	Filed documents forwarded by Magistrate Goettel: warrant for arrest of Herbert Kaminsky dated 4-14-75.
05-18-76	(atty and defts. present) Pre-trial conference held. Tennyy,J.
05-25-76	Filed Appearance Bond for deft. Harry L. Benson -from Central District of Los Angeles,California- check deposited in Treasury.
05-27-76	Filed Order re: authorization of Central Penal Registry in Bern to release full record of all criminal proceedings against deft. Hans Heinrich Bunler to the U.S. Embassy in Bern,Switzerland to be transmitted to the U.S.D.C. S.D.N.Y. Hon. C.H. Tenney. Tenney,J. m/n
05-24-76	(attys and defts present) trial begun before Judge Tenney. (jury)
05-25-76	Trial cont'd.
05-26-76	Trial cont'd.
05-27-76	Trial cont'd.
05-28-76	Trial cont'd.
06-01-76	Trial cont'd.
06-02-76	Trial cont'd. and concluded. Benson-found guilty on each of cts 1,2 & 3 Presentence investigation ordered. Sent. adj'd. until 7-7-76. Bail cont'd. Tenney,J.
	Kaminsky- found guilty on each of cts 1,2 & 3. Presentence investigation ordered. Sent. adj'd until 7-7-76. Deft. remanded in lieu of bail fixed in the sum of $150,000. Tenney,J.
	Danise-found guilty on each of cts 2 & 3- Pre-sentence investigation ordered. Sent. adj'd. until 7-7-76. Bail cont'd. Tenney,J.
06-15-76	Filed Order (see entry of 5-27-76). Tenney,J.
06-22-76	Filed deft. H. Benson's notice of motion re: order to perpetuate the testimony of Werner Barth,etc. ret: 6-30-76.
06-22-76	Filed deft. H. Levine's notice of motion re: perpetuate testimony,etc.
07-13-76	Filed memo-end. on motion docketed 6-22-76. Motion denied,etc. Tenney,J. m/n
07-16-76	Filed transcript of record of proceedings, dated 5-7-76.
07-16-76	Filed transcript of record of proceedings, dated 5-18-76.

cont'd. on next page

DOCKET 75 Cr. 538

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
8-25-76	H. Kaminsky (atty. Jay Goldberg) Filed Judgment-Cts. 1& 2- 3 yrs. imprisonment ea. ct.conc. and 5 yrs. impr. on ct. 3- to run concs. w/cts. 1 & 3. Execution of prison sentence on cts. 1 & 2 is suspended. Deft. is placed on prob. for a period of 3 yrs., on ea. of cts. 1 & 2 to run conc. with each other, to commence upon expiration of confinement on ct. 3, subject to the standing probation order ofthis Court. Pursuant to the provisions of Sec. 4205 T. 18 (b)(2) the deft. sahll become eligible for parole at such time as the Parole commission may determine. Tenney,J. issued all copies			
8-25-76	M. Danise (atty. Robert Mitchell) Filed Judgment - cts. 2 & 3- 3 yrs. impr. ea. ct. conc. Execution of sentence is suspended, 4 yrs. pro[illegible] w/super.. Ct. 1 dismissed on deft's motion. Tenney,J. issued all copies.			
8-25-76	H. Benson (atty. Gilbert Epstein) Filed Judgment- Ct. 1 & 2- 3 yrs. impr. ea. ct. conc. 4 yrs. impr. on ct. 3 to run cons. w/sent. on cts 1 & 2. Execution of sent. on cts. 1 & 2 is suspended. 3 yrs. prob. w/super. Parole 18:4205(b)(2). Bail pending appeal is cont'd. on condition that the deft. promply prosecute his appeal in accordance with the rules of this court and thr rules of the Court of Appeals for the Circuit. Tenney,J. issued all copies.			
8-25-76	Filed deft. H. Benson's notice of appeal from judgment Of 8-25-76. Mailed copies.			

Court

A-4

JGE:bmj
75-0158
0-247

75 CRIM. 538

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

UNITED STATES OF AMERICA

- v - : INDICTMENT

HARRY LEVINE BENSON, : 75 Cr.
HERBERT KAMINSKY, and
MARI-ANN DANISE, :

Defendants. :

- -x

U.S. DISTRICT COURT
FILED
JUN 5 1975
S. D. OF N. Y.

The Grand Jury charges:

1. From on or about the 13rd day of December, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, HARRY LEVINE BENSON, HERBERT KAMINSKY, and MARI-ANN DANISE, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others to the Grand Jury known and unknown, to commit offenses against the United States, to wit, violations of Section 1343 and 1314 of Title 18, United States Code.

2. It was part of said conspiracy that the defendants, having devised a scheme and artifice for obtaining the property of Hans Bubler by means of false and fraudulent promises and representations, would cause it to be transmitted by means of wire communications in interstate and foreign commerce writings for the purpose of executing such scheme or artifice.

3. It was further a part of said conspiracy that the defendants, having devised a scheme and artifice for obtaining the property of Hans Bubler by means of false and fraudulent promises and representations, would induce the said Hans Bubler to travel in interstate and foreign commerce in the execution of said scheme and artifice.

JCF:bmj
75-0158
M-247

OVERT ACTS

In furtherance of said conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about the 23rd day of December, 1974, Hans Buhler had a conversation with HERBERT KAMINSKY and MARI-ANN DANISE at 251 West 39th Street, New York, New York;

2. On or about the 23rd day of December, 1974, HERBERT KAMINSKY took from Hans Buhler a 9.88 karat diamond at 251 West 39th Street, New York, New York;

3. On or about the 23rd day of December, 1974, HERBERT KAMINSKY introduced Hans Buhler to HARRY LEVINE BENSON at 251 West 39th Street, New York, New York;

4. On or about the 23rd day of December, 1974, HERBERT KAMINSKY took from Hans Buhler a 8.35 karat emerald at 251 West 39th Street, New York, New York;

5. On or about the 23rd day of December, 1974, Hans Buhler and HARRY LEVINE BENSON boarded an airplane for Chicago Illinois;

6. On or about the 31st day of December, 1974, MARI-ANN DANISE and HERBERT KAMINSKY spoke in New York, New York by telephone to Hans Buhler in Zurich, Switzerland;

7. On or about the 3rd day of January, 1975, Hans Buhler had a conversation with MARI-ANN DANISE and HERBERT KAMINSKY at 251 West 39th Street, New York, New York.

(Title 18, United States Code, Section 371.)

JGE:bmj
75-0158
M-247

A.C

SECOND COUNT

The Grand Jury further charges:

From on or about the 23rd day of December, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York, HARRY LEVINE BENSON, HERBERT KAMINSKY, and MARI-ANN DANISE, the defendants, having devised a scheme and artifice for obtaining the property of Hans Buhler, to wit, two gems having an aggregate value in excess of $200,000.00, by means of false and fraudulent promises and representations, did transmit by means of wire communication, in interstate and foreign commerce, messages for the purpose of executing such scheme.

(Title 18, United States Code, Section 1343.)

THIRD COUNT

The Grand Jury further charges:

From on or about the 23rd day of December, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York, HARRY LEVINE BENSON, HERBERT KAMINSKY, and MARI-ANN DANISE, the defendants, having devised a scheme and artifice for obtaining the property of Hans Buhler, to wit, two gems having an aggregate value in excess of $200,000.00, by means of false and fraudulent promises and representations, did induce the said Hans Buhler to travel in interstate and foreign commerce in the execution of said scheme.

(Title 18, United States Code, Section 2314.)

Foreman

PAUL J. CURRAN
United States Attorney

A. 7

8-25-76 Harry Levine Benson (atty and deft present) Gilbert Epstein Esq

deft sent to 3 years on cts 1 & 2 to run concurrently with each other & 4 years on ct 3 to run consecutively with cts 1 & 2. Execution of prison sent on cts 1 & 2 is suspended. deft placed on probation for a period of 3 years, on cts 1 & 2 to commence upon expiration of confinement on ct 3. deft is sentence pursuant to Sec. 4205 Title 18 Subdivision (b)(2)

Bail pending appeal is continued. ~~Ragg~~ The Court order commitment to the custody of the Atty Gen'l and recommends that the deft serve his sent at the Federal Correctional Institution, Lexington, Kentucky.

Tenney,J.

8-25-76 Herbert Kuminsky (Atty and deft present) Jay Goldberg, Esq.

deft sent to 3 years on cts 1 & 2 to run concurrently with each other and 5 years on cts 3 to run consecutively with cts 1 & 2, execution of prison sent on cts 1 & 2 is suspended. deft placed on probation for a period of 3 years, on cts 1 & 2 to commence upon expiration of confinemen on ct 3. deft is sentence pursuant to Sec 4205 Title 18 Sub. (b)(2) deft remanded in lieu of bail previously fixed. the Court recommends that the deft serve his sentence at the Federal Correctional Institution, Lexington, Kentucky. Tenney,J.

8-25-76 Mari-Ann Danise (Atty and deft present) Robert Mitchell, Esq.

deft sent to 3 years, on each of cts 2 & 3 to run concurrently ~~xxxh~~ with each other/ Execution of sentence is suspended. deft is placed on probation for a period of 4 years, subject to the standing probation order of this Court.

Count one is dismissed on motion of deft's counsel with the consent of the Gov't. Tenney,J.

75 CRIM 538

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

HARRY LEVINE BENSON,
HERBERT KAMINSKY, and
MARI-ANN DANISE,

Defendants.

INDICTMENT

75 Cr.

(18, U.S.C. §§ 371, 1343 and 2314.)

PAUL J. CURRAN

United States Attorney.

A TRUE BILL

Foreman.

FPI—88—2-19-71—200M—6930

U.S. DISTRICT COURT FILED JUN 9 1975 S.D. OF N.Y.

JUN 9 1975

Capt. Harry Levine Benson BENCH WARRANT ORDERED.

JUDGE TENNEY Gagliardi J.

6/16/75 - Deft. Benson (B/W issued)
Not guilty plea directed to be entered.
Deft. Kaminsky - (atty present)
pleads Not guilty. ($10,000 Bail continued).
Deft. Mari-Ann Danise -
(atty: Robert Mitchell) pleads N/G
Bail $25,000. bail continued.
Gagliardi J.

May 7, 1976 - Harry Levine Benson.
Defendant is Directed to appear
before Pauley Court Monday 6-10-76
and to appear before the Court
at 2 p.m. 6-10-76 in Courtroom 705 -
Bail fixed in the Sum of $150,000
PRB Secured. Bail is to continue
as Defendant is to Report Daily
to the Pretrial Services

A-8

(In open court- jury present.)

CHARGE OF THE COURT

THE COURT: Members of the Jury, we come now to that part of the case where the evidence is in, the lawyers have presented their arguments and you are about to exercise your final role, which is to pass upon and to decide the fact issues that are in this case.

But first, I want to express my thanks to each of you for your faithful devotion to your duties in this case. It is your responsibility to reach a just decision in the determination of the charges against the defendants, and I know that you will deliberate toward reaching a verdict fairly, honestly and conscientiously.

Now, as jurors, I want to impress upon you that you are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony or exhibits in the case.

My function at this point is to instruct you as to the law that is applicable to the case. It is your sworn duty to accept the law as I state it to you in these instructions, and to apply it to the facts as you find the facts to be. You are to perform this duty without bias or prejudice to the

defendants or to the government. The law does not permit jurors to be governed by sympathy, prejudice or bias. Both the parties and the public, as well as the Court, expect you to carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict. It is your duty, as jurors, to consult with one another and to deliberate with a view toward unanimously agreeing upon a verdict, if you can do so without violence to your individual judgment and conscience.

With respect to any fact matters, it is your recollection and yours alone that governs. Anything that counsel, either for the government or for the defense may have said with respect to the matters in evidence, whether during the trial, in the form of a question, in argument or in summation, is not to be substituted for your own recollection of the evidence. So too, anything the Court may have said during the trial, or may refer to during the course of these instructions, as to any matter in evidence, is not to be taken in lieu of your own recollection. As I have instructed you during this trial, the case must be decided upon the sworn testimony of the witnesses and such exhibits as were received in evidence. Now, the nature of the crime charged against a defendant must in no respect enter into your deliberations. In addition, let me point out that the fact that the government

is a party, that is, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that accorded to any other party to the litigation; and, by the same token, it is entitled to no less consideration. All parties, the goverment and individuals alike, stand equal before the bar of justice.

Before we consider the charge itself and what is required to sustain it, there are certain preliminary observations that are in order, certain principles of law that are applicable in every criminal case and to which I made reference at the time of your selection as jurors.

First, the indictment is simply an accusation, a charge. It is no evidence or proof of the guilt of a defendant. It is merely a means utilized by the government to bring a defendant before this Court. It is nothing more or less. You will not give any weight whatever to the fact that an indictment has been returned against these defendants.

Now, the defendants have pleaded not guilty. Therefore, the government has the burden of proving by competent evidence the charges made against thembeyond a reasonable doubt. Whether this burden is sustained does not depend upon the number of witnesses or the quantity of testimony, but rather on the nature and quality of the testimony and other evidence. It is a burden that never shifts and remains upon the government

throughout the entire trial.

A Defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the accusations contained in the indictment. The government must prove his guilt beyond a reasonable doubt.

This presumption of innocence is not an idle phrase, to be taken lightly by the jury, but is an important right belonging to every person accused of a crime. Each juror is bound to entertain it conscientiously, without any mental reservations whatever, and to give these defendants its full benefit.

As I told you at the start of this trial, this presumption of innocence was in the defendant's favor then; it is present during the entire course of the trial; it is in the defendant's favor even as I instruct you now, and remains in the defendant's favor during the course of your deliberation in the jury room. It is removed only if, and when, you, the members of the jury, are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

Now, the indictment in this case is in three counts. This means that three separate crimes are charged.

The first count of the indictment, the conspiracy count, charges that from on or about the 23rd day of December,

1974, up to and including June 5th, 1975, the defendants, Harry Levine Benson, Herbert Kaminsky, and Mari-Ann Danise, did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree with each other, and with others unknown to commit offenses against the United States. Section 371 of title 18 of the United States Code makes it a crime "if two or more persons conspire...to commit any offense against the United States...and one or more of such persons do any act to effect the object of the conspiracy..."

The indictment states that it was part of said conspiracy that the defendants, having devised a scheme and artifice for obtaining the property of Hans Buhler by means of false and fraudulent representations, would cause to be transmitted, by means of wire communications, in interstate and foreign commerce, messages for the purpose of executing such scheme. It was further part of said scheme that the defendants would induce Hans Buhler to travel in interstate and foreign commerce in the execution of such scheme.

Count two of the indictment charges that during this same period of time, the defendants, having devised a scheme and artifice for obtaining the property of Hans Buhler, to wit, two gems having an aggregate value in excess of $200,000, by means of false and fraudulent promises and representations, did transmit by means of wire communicatio

in interstate and foreign commerce, messages for the purpose of executing such scheme. Section 1343 of title 18 of the United States Code states that "whoever, having devised or intending to devise any scheme or artiface to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits, or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice..."shall be guilty of a crime.

The third count of the indictment charges that the defendants, having devised such scheme, did by means of false and fraudulent representations, induce the said Hans Buhler to travel interstate and foreign commerce, in the execution of said scheme. This count charges the defendants with violating Section 2314 of Title 18 of the United States Code which states that "whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artiface to defraud that person of money or property having a value of $5,000 or more..."shall be guilty of a crime.

Now, as I mentioned earlier, the indictment in this case contains three counts. Each count charges a separate crime and they must be considered separately.

The indictment names three defendants in all, and you are familiar by now with their names. They are the only persons whose guilt or innocence you must announce in your verdict, although, as I will explain to you shortly, in considering their guilt or innocence you may have to determine the nature of the participation, if any, of others who are not named as defendants.

You must bear in mind that guilt or innocence is personal. The guilt or innocence of a person on trial before you must be determined separately with respect to him and solely on the evidence presented against him or the lack of such evidence. The case of each defendant stands or falls upon the proof or the lack of proof of the charge against him and not upon proof presented against someone else.

Finally, remember that you must return a verdict as to the guilt or innocence of each defendant on each count of the indictment separately. Also, bear in mind that any verdict, whether of guilt or innocence, must be unanimous.

Now we come to the crime charged in Count One of the indictment, the conspiracy count.

In order to convict Harry Levine Benson, Herbert Kaminsky or Mari-Ann Danise, of the conspiracy charged in Count One of the indictment, the government must establish beyond a reasonable doubt each of the following three elements of the crime against the defendant then under consideration by you:

First, the existence of the conspiracy charged in the indictment.

Second, that the particular defendant whose guilt or innocence you are then considering willfully became a participant in the conspiracy; and, third that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged, and that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy. I will explain the meaning of overt acts to you shortly.

If, and only if, you are satisfied that the government has proven each of the elements of the crime charged in Count One of the indictment as to the defendant then under consideration by you beyond a reasonable doubt will you return a verdict of guilty as to that defendant. Should the government fail to prove any one of the elements of the crime charged in Count One of the indictment to your satisfaction

beyond a reasonable doubt, then you must return a verdict of acquittal.

Now, I will explain each of these elements to you in a little greater detail.

Now, as to the first element that I just mentioned, the Government must prove beyond a reasonable doubt that a conspiracy existed. At this point some of you might be asking yourselves what is a conspiracy. Well, a conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a crime or unlawful purpose or to accomplish some purpose that is not itself criminal, but to do so by criminal or unlawful means.

The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Whether or not the persons charged in the indictment accomplished what it is alleged they conspired to do is immaterial to the question of their guilt or innocence.

A conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the agent of every other member. However, to establish a conspiracy the Government is not required to show that two or more persons sat around a table and entered into a solemn compact, orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth the details of the plans, the means by which the unlawful project is to be carried out, or

the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal document or specific oral agreement.

Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy much is left to unexpressed understanding. Thus, it is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful agreement you may judge acts and conduct of the alleged member of the conspiracy which are done to carry out an apparent criminal purpose. The adage that actions speak louder than words may be applicable here.

Usually the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts, however, when taken together in connection with each other and with the reasonable inferences flowing therefrom show a conspiracy or agreement to secure a particular result.

If upon consideration of all the evidence, direct or circumstantial, you find beyond a reasonable doubt that the

the minds of at least two of the alleged conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the existence of the conspiracy, but only of its existence, is established.

Now, I have emphasized that in order for you to find that a conspiracy existed you must find an agreement by two or more persons. Thus, if you find that any two or more of the persons agreed to violate the law, then you may find that there was a conspiracy.

The indictment charges that the conspiracy in question had as its objects the violation of two federal statutes, 18 U.S.C. §§1343 and 2314. The first of these is commonly called the wire fraud statute, and the second the interstate transporation of stolen property statute insofar as it relates to interstate travel in the execution of a scheme to defraud. As I have already charged you, you must find beyond a reasonable doubt that an agreement existed to violate at least one of these statutes.

The Government's proof may, but need not, establish all of these objectives of the conspiracy. If you find that the agreement had as its object any one of these unlawful activities, then you may be satisfied that the existence of

conspiracy is established.

Once again, in this connection, it is not necessary for the Government to prove the success of the conspiracy in order to show a violation of the statute. A conspiracy is basically the agreement to violate the law. Thus, a conspiracy, if you so find it, may exist even though the objectives of the conspiracy were never accomplished.

Now, while the indictment charges that the conspiracy existed from on or about December 23, 1974 until June 5, 1975, it is not essential that the Government prove that the conspiracy started and ended on or about those specific dates. It is sufficient if you find that, in fact, a conspiracy was formed and existed for some substantial time within the period set forth in the indictment.

Now, if you have found that a conspiracy existed then we pass to the second element that I mentioned, that is, membership by a defendant in the conspiracy. If you do conclude that a conspiracy existed you must then determine whether the Government has proven beyond a reasonable doubt that the particular defendant under consideration was a member of the conspiracy.

In determining whether any of these defendants became a member of a conspiracy you must determine not only whether he participated in it, but whether he did so

with knowledge of its unlawful purpose.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Mere association with one or more of the conspirators does not make one a member of the conspiracy, nor is knowledge without participation sufficient.

Before the jury may find that a defendant or any other person has become a member of a conspiracy the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intelligently and with specific intent to do something which the law forbids, or with specific intent to fail to do something the law requires to be done, that is to say, to act or participate with the bad purpose either to disobey or to disregard the law.

So if a defendant or any other person with understanding of the unlawful character of a plan knowingly en-

courages, advises or assists for the purpose of furthering the undertaking or scheme he thereby becomes a willful participant, a conspirator.

Now, one who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only that defendant's acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of its members.

If you have found a conspiracy to exist and a particular defendant to have knowingly participated in it, the extent of his participation has no bearing on his guilt or innocence. The guilt of a conspirator is not measured by the extent or duration of his participation. So even if he participated in it to a degree more limited than that of his co-conspirators, he is equally culpable, as long as he was in fact a conspirator.

Finally, all of the conspirators need not be acquainted with each other. They need not have previously associated

together. One of the defendants may know only one other member of the conspiracy, but if he enters into an unlawful agreement with that other member of the conspiracy he becomes a party.

Now, before I come to the third element of the crime of conspiracy I want to say a few words about the acts and statements of co-conspirators.

When people enter into a conspiracy to accomplish an unlawful end they become agents for one another in carrying out the conspiracy. Hence, the acts or declarations of one in the course of the conspiracy and in furtherance of the common purpose are deemed to be the acts of all and all are responsible for such acts.

It is important to note that this principle normally applies only to the acts and declarations done or made during the continuance of the conspiracy and in furtherance of it, that is, to carry out an unlawful objective or purpose of the conspiracy. It does not apply to acts or declarations which do not have these characteristics.

However, where one joins an existing conspiracy he is deemed to have adopted the prior acts and declarations of the others who are already members of the conspiracy, to the extent that such acts and declarations are in furtherance of the conspiracy and the conspiracy is then in existence,

even if he is not specifically aware of the acts or declaration so long as they are done in furtherance of the conspiracy.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, as well as the other prior acts and statements which I have already mentioned, by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.

One final word on this subject. It's up to you to determine the point in time when you find the conspiracy, if one in fact existed, commenced. Once you find a conspiracy to have commenced, then the rules I just set forth regarding liability for the acts and statements of fellow conspirators come into play.

However, if you should find that the conspiracy, if one existed, commenced at some later point in time, then evidence of what a person may have done prior to the

commencement of the conspiracy is not binding on anyone else.

Now, we come to the third and final element of the crime of conspiracy which you must consider, assuming that you have found beyond a reasonable doubt the prior two elements that I have mentioned, and this is the requirement of an overt act. You may not find any of the defendants guilty of the crime of conspiracy unless, and until, you are convinced beyond a reasonable doubt that at least one overt act was committed, at or about the time and place alleged, and that such overt act was knowingly done in furtherance or some object or purpose of the conspiracy.

An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be an innocent as the act of a man walking across the street or using the telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

An act is done "knowingly" if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent purpose.

Now, it is not necessary for the Government to

prove that each member of the conspiracy committed or participated in the particular overt acts, since t he acts of any one done in the furtherance of the conspiracy become the acts of all the other members. Also, the Government is not required to prove each of the overt acts alleged. It is sufficient if it proves the commission of at least one of the acts at or about the time alleged.

I will now read to you the overt acts which are charged in the indictment, and the Government must prove that at least one of these overt acts was committed in furtherance of the conspiracy.

So it is charged that in pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about the 23rd day of December, 1974, Hans Buhler had a conversation with Herbert Kaminsky and Mari-Ann Danise at 251 West 39th Street, New York, New York;

2. On or about the 23 day of December, 1974, Herbert Kaminsky took from Hans Buhler a 9.88 Karet diamond at 251 West 39th Street, New York, New York;

3. On or about the 23rd day of December, 1974, Herbert Kaminsky introduced Hans Buhler to Harry Levine Benson at 251 West 39th Street, New York, New York;

4. On or about the 23rd day of December, 1974, Herbert Kaminsky took from Hans Buhler a 8.35 karet emerald at 251 West 39th Street, New York, New York;

5. On or about the 23rd day of December, 1974, Hans Buhler and Harry Levine Benson boarded an airplane for Chicago Illinois;

6. On or about the 31st day of December, 1974, Mari-Ann Danise and Herbert Kaminsky spoke in New York, New York by telephone to Hans Buhler in Zurich, Switzerland;

7. On or about the 3rd day of January, 1975, Hans Buhler had a conversation with Mari-Ann Danise and Herbert Kaminsky at 251 West 39th Street, New York, New York.

So summarizing the first count: In order for you to return a verdict of guilty against any of these defendants on the crime of conspiracy charged in Count One of the indictment, you must first find as to the particular defendant then under consideration by you, that the Government has established each of the following three elements of the crime to your satisfaction beyond a reasonable doubt:

First, the existence of the conspiracy charged in the indictment.

Second, that the particular defendant whose guilt or innocence you are then considering willfully became a participant in the conspiracy, and

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged, and that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy.

If, and only if, you are satisfied that the Government has proven the existence of each of these elements beyond a reasonable doubt will you return a verdict of guilty as to the defendant under consideration. Should you not be satisfied that the Government has sustained its burden of proof as to the particular defendant under consideratio then you must return a verdict of acquittal for that defendant as to Count One.

We come to count 2:

Now, in order for you to find any of the defendants guilty of the crime charged in Count Two of the indictment, you must first be satisfied that the Government has met its burden of proving each of the following three elements as to the defendant then under consideration by you, beyond a reasonable doubt:

1. That from on or about the 23rd day of December, 1974 until June 5, 1975 the date of the filing of this indictment the defendants devised a scheme or artifice to defraud for obtaining property by fraudulent pretenses or representatio

2. That each defendant did devise or became a party to such a scheme or artifice knowingly and wilfully, with knowledge of its fraudulent nature and with intent to defraud.

3. That he or she did use, or cause another to use, for the purpose of executing the scheme or artifice transmissions, either over the telephone or other wire communications in interstate or foreign commerce.

If, and only if, you are satisfied that the Government has proven each of the elements of the crime charged in count two of the indictment as to the defendant then under consideration by you, will you return a verdict of guilty as to that defendant on this particular count. Should the Government fail to prove any one of the elements of the crime charged in count two of the indictment as to the defendant then under consideration by you beyond a reasonable doubt, then you must return a verdict of acquittal as to that defendant on this count.

Now, I will explain each of these elements to you in a little greater detail.

The first element of the wire fraud count is the existence of a scheme or artifice to defraud. The language describing this first element is almost self-explanatory.

A "scheme or artifice" is merely a plan for the accomplishment of an object. Such a scheme or artifice

may be found to exist without evidence of any formal action to make it effective.

"Fraud" is a generic term which embraces all th e many means which human ingenuity can devise and which are resorted to by one individual to gain and advantage over another by false representation, suggestions or by suppression of the truth.

Thus, a scheme or artifice to defraud is any plan or device by which one seeks to induce another to act in a way against his interests by means of representations as to a material fact which are false and untrue. Such representations may be made in two ways:

(1) By statements of a material fact which are just not true; and

(2) By the omission from a statement purporting to state a particular fact or facts of other material facts which are necessary to a proper understanding of the truth of the matters stated.

In other words, once having undertaken to state a fact there is an obligation on the one who does so, not give such a distorted picture of them as to make the statement misleading concerning what the actual facts really are.

Sometimes a half truth is no better than an outright falsehood and a fraudulent misrepresentation may be

effected by half truths calculated to mislead. Having chosen to speak, there is an obligation to state all the facts which are necessary to a proper understanding of the particular subject matter which is being covered.

A statement although literally true, is nonetheless false if, when interpreted in the light of the effect it would produce on the minds of those whom it was calculated to influence, it would create a false impression of the true state of affairs.

This second element of the wire fraud charge which the Government must establish beyond a reasonable doubt is that when and if defendants did the acts with which he or she is charged he or she acted wilfully and knowingly.

The word "Knowingly" means that the defendant acted purposely and deliberately. Similarly, "wilfully" is used here. It means intentionally, with a bad purpose to do that which the law forbids. In other words, as to each defendant you must find that the defendant purposely did the acts which he or she is charged, and did not act carelessly or negligently or through inadvertent error or mistake or something of that nature.

Under these statutes a false representation or omission to state a material fact does not amount to a fraud, unless it is made with fraudulent intent. Honesty and

good faith on the part of the defendant is always a good defense to the charges in these counts. An honest belief in the truth of the representations made by him is a good defense however inaccurate the statements may turn out to be.

The significant fact is the intent and the purpose with which the defendant acted.

The mere fact that a statement may be incorrect, or even a gross misrepresentation of the facts does not amount to fraud in the law unless the statement was made by the defendant knowingly and wilfully and with an intention to deceive.

The question of the defendant's knowledge and his intent and his wilfulness is a question of fact you must decide in this case. But, unlike most other questions of fact, it involves what is in a person's mind or the purpose which motivate him in a given course of conduct. Obviously, we have not yet devised, and perhaps it is well if we never did, an instrument to record what goes on in a man's mind. Rarely is direct proof available that a man has knowledge of a particular fact or has a particular purpose in mind when he acts.

(Continue on next page.)

Thus, direct proof of the knowledge of falsity and of wilful a nd wrongful intent is not necessary. Usually such knowledge or purpose is established by circumstantial evidence and determined from the acts and conduct and all the circumstances and the natural inferences that you may draw therefrom.

I, have previously instructed you on the meaning of false statements and misrepresentations. Remember that they may be made either by statements which are direct untruths -- such as to say that something happened when it did not -- or by statements of "half truths" -- leaving out a part of the facts necessary to an understanding of the complete truth.

Remember also that the misrepresentations must be material; that is, of such a nature that it would tend to influence a person's decision whether to act or not.

If you find that the defendant under consideration knowingly and wilfully engaged in a scheme to defraud, you must then consider the next element of the offense charged, that is, whether telephones or cables were used in furtherance of that scheme.

The Government alleges that international telephone calls were made to transmit information necessary to the

transaction. It is not necessary that the matter thus communicated contain in itself anything criminal or objectionable or any misrepresentations or disclose a fraudulent purpose or show that it was in furtherance of the scheme. The matter may be wholly innocent in itself. Nor is it necessary that the defendant under consideration personally telephoned, cabled or otherwise transmitted the alleged matter. You need only find that the defendant caused the transmission by taking steps which he knew at the time might naturally and probably result in the use of the telephone or cable.

Now, in order for you to find any of the defendants guilty of the crime charged in count two of the indictment, you must first be satisfied that the Government has met its burden of proving each of the following three elements as to the defendant then under consideration by you, beyond a reasonable doubt?

1: That from on or about the 23rd day of December, 1974 until June 5, 1975 the date of the filing of this indictment the defendants devised a scheme or artifice to defraud for obtaining property by fraudulent pretenses or representations.

(Continued on Next page)

2. That each defendant did devise or became a party to such a scheme or artifice knowingly and wilfully, with knowledge of its fraudulent nature and with intent to defraud.

3. That he or she did use, or cause another to use, for the purpose of executing the scheme or artifice transmission either over the telephone or other wire communications in interstate or foreign commerce.

If, and only if, you are satisfied that the Government has proven each of the elements of the crime charged in count two of the indictment as to the defendant then under consideration by you, will you return a verdict of guilty as to that

(Continued on Next page)

defendant on this particular count. Should the Government fail to prove any one of the elements of the crime charged in count two of the indictment as to the defendant then under consideration by you beyond a reasonable doubt, then you must return a verdict of acquittal as to that defendant on this count.

In order to find a defendant guilty under count three of the crime of inducing travel in interstate commerce in connection with a scheme or artifice to defraud, you must find each of the following elements has been established beyond a reasonable doubt.

First, that from on or about the 23rd day of December, 1974 through the 5th day of June, 1975, the defendants devised or was intending to devise a scheme or artifice to defraud for obtaining property from Hans Buhler by means of false or fraudulent pretenses, representations or promises;

Second, that the defendant induced such person, Hans Buhler, to travel in or be transported in interstate commerce in the execution of a scheme or artifice to defraud that person, Hans Buhler, of property;

Third, that the value of said property was $5,000 or more;

If, and only if, you are satisfied that the Government has proven each of the elements of the crime charged in count

three of the indictment as to the defendants then under consideration by you, will you return a verdict of guilty as to that defendant on this particular count. Should the Government fail to prove any one of the elements of the crime charged in count three of the indictment as to the defendants then under consideration by you beyond a reasonable doubt, then you must return a verdict of acquittal as to that defendant on this count.

The first element of the offense refers to devising a scheme or artifice to defraud by obtaining property from Hans Buhler. I have charged you previously on what constitutes a scheme or artifice to defraud.

The second element refers to the inducement of interstate travel. You must find that pursuant to the scheme the defendants induced Hans Buhler to travel in interstate or foreign commerce.

The third element that I have referred to is value of the property in question. In order for you to find this third element of the offense to be established, you must be satisfied that the Government has proven that the property, that is the diamond and the emerald described in the indictment, had an aggregate value of $5,000 or more. Like each of the other elements, this element must be established to your satisfactions beyond a reasonable doubt.

hpms

In order to find a defendant guilty under Count three of the crime of inducing travel in interstate commerce in connection with a scheme or artifice to defraud, you must find each of the following elements has been established beyond a reasonable doubt.

First, that from on or about the 23rd day of December, 1974 through the 5th day of June, 1975, the defendants devised or was intending to devise a scheme or artifice to defraud for obtaining property from Hans Buhler by means of false or fraudulent pretenses, representations or promises;

Second, that the defendant induces such person, Hans Buhler, to travel in or be transported in interstate commerce in the execution of a scheme or artifice to defraud that person, Hans Buhler, of property;

Third, that the value of said property was $5,000 or more;

If, and only if, you are satisfied that the Government has proven each of the elements of the crime charged in count three of the indictment as to the defendant then under consideration by you, will you return a verdict of guilty as to that defendant on this particular count. Should the Government fail to prove any one of the elements of the crime charged in count three of the indictment as to the

defendant then under consideration by you beyond a reasonable doubt, then you must return a verdict of acquittal as to that defendant on this count.

It is not necessary for the Government to show in each case that the defendant whose guilt or innocence you are considering physically committed the crime himself. Section 2 of Title 18 of the United States Code provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

In order to aid and abet another to commit a crime it is necessary that the accused willfully associated himself in some way with the criminal venture, and willfully participated in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or ommission of his to make the criminal venture succeed.

An act or ommission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

You, of course, may not find any defendant guilty unless you find beyond a reasonable doubt that every

element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

To determine whether any of the defendants aided and abetted the commission of an offense, you may ask yourselves these questions: Did the defendant associate himself with the venture? Did the defendant participate in it as something he wished to bring about? Did he seek by his action to make it succeed? If he did, then that defendand is an aider and abetter.

Now, throughout my instructions, I have used the term "reasonable doubt". What is a reasonable doubt?

A reasonable doubt is one which appeals to your reason, your judgment, your common sense, and your experience. It is not impulse, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty, nor sympathy for the defendant. On the contrary, it is a doubt which a reasonable person has after carefully weighing all the evidence.

A reasonable doubt may arise not only from the evidence presented, but also from a lack of evidence. Since the burden is always on the prosecution to prove the accused guilty of every essential element of the crime charged beyond a reasonable doubt, a defendant has the right to rely upon the failure of the prosecution to establish such proof in order

to create a reasonable doubt.

If, after fair and impartial consideration of all the evidence in the case, or the lack of it, you can honestly say that you have such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves, then you have a reasonable doubt and, in that circumstance, it is your duty to acquit.

On the other hand, if after a fair and impartial consideration of all the evidence you can honestly say that you are satisfied of the the guilt of the defendant, with such conviction that you would be willing to act upon it in important and weighty matters in the affairs of your own life, then you have no reasonable doubt and, in that circumstance, it is your duty to convict.

If the jury feels that the evidence in the case as reasonably permitting of two conclusions, one of innocence, the other of guilt, the jury must adopt a conclusion of innocence and acquit.

One final word on this subject. "Beyond a reasonable doubt" does not mean beyond all possible doubt. If that were the rule, few persons, however quilty the might be, would be convicted. Consequently, the law in a criminal case is that it is sufficent if the guilt of a defendant is established beyond a reasonable doubt.

Now, I want to explan that there are two types of evidence which a jury may properly rely on 'n deciding the guilt or innocent of an accused. One id direct evidence such as testimony of a witness relating to what he heard or saw - something he knows of through his own knowledge, which bears directly on a fact issue in the case. For example, testimony by a witness that he saw a defendant in possession of an object is direct evidence which if believed by the jury, e[illegible]blishes the fact that the defendant was in possessi[illegible] of the obje[illegible].

The other type of evidence is circumstantial evidence which is proof of a fact or circumstance from which one may infer connected facts which reasonably follow in man's common experience. Circumstantial evidence is that evidence which tends to prove a disputed fact through proof of other facts. To use very simply example: if you look out of the window and see it raining, then your statement that you see rain coming down is direct evidence that is raining. If instead of looking out of the window you see a succession of people coming inside, each with raincoats, rubb[illegible] and umbreallas, and each dripping wet, then your statement as to that observation is circumstantial evidence of the fact th[illegible] it is raining.

Circumstantial evidence is of no less value than

direct evidence, for as general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Now, there are times when different inferences may be drawn from a certain set of facts. An inference is a deduction or conclusion which a jury is permitted to draw from facts which have been established by either the direct or circumstantial evidence introduced in the case. An inference is not drawn by speculation or guesswork but rather arrived at by an exercise of your reason and common sense. So while considering the evidence presented, you are permitted to draw, from the facts which you find to have been proven, such reasonable inferences as seem justified in the light of your experience. But here again, let me remind you that whether based on direct or circumstantial evidence or the logical, reasonable inferences drawn from such evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt.

Now I want to talk to you very briefly about the credibility or believeability of witnesses.

You are the sole judges of the credibility or truthfulness of each witness in this case. In weighing the

testimony of each witness, you should consider his relationship to the Government or to the defendant, the extent of the witness' interest, if any, in the outcome of the case, his manner of testifying, his appearance and conduct while on the stand, his intelligence, the strength or weakness of his recollection, and the extent of which he has been corroborated or contradicted, if at all, by the other credible evidence.

The ultimate question for you to decide in passing upon the credibility of a witness is "did the witness tell the truth"; and to this end, you are to use your everyday common sense.

If you find that any witness has deliberately testified falsely to any material fact, you may disregard all of his testimony or you may accept that part of his testimony which you believe is truthful, or which you find to be corroborated or supported by other evidence in the case.

Now, as I mentioned earlier, the law permits, but does not require a defendant to take the stand and testify in his or her own behalf.

The defendants have not testified in this case. This is their absolute right. They are not required to do so. As I have told you, they do not have to prove their

innocence; The burden of proof is always on the Government to establish the guilt of a defendant beyond a reasonable doubt.

In no respect may such failure to testify be considered by you as any evidence whatsoever against a defendant. Or give rise to any basis for a presumption or inference unfavorable to him.

You may not permit such fact to weigh in the slightest degree against a defendant nor should it enter into your deliberations or discussions.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible to impeach the credibility of the witness and not to establish the truth of these statements. It is the exclusive province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

The testimony of a witness may be discredited or

impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

You have heard testimony regarding acts similar to those charged in this indictment which were allegedly committed by the defendant Kaminsky. You may consider this testimony in determining whether the defendant who allegedly committed those similar acts had the requisite willfullness or intent required to sustain a conviction with regard to the acts charged in the indictment presently before you.

Let me caution you, however, that before you may consider such evidence at all you must first be satisfied that the Government has proven each of the other elements of the crimes charged in the present indictment beyond a reasonable doubt. Only then, may you consider this evidence with regard to the present indictment in determining whether the defendant in question acted with an awareness of wrongdoing that is, with willfullness or with the requisite intent required, rather than out of mistake or inadvertence or some other innocent reason. This evidence may not be considered

by you in support of the truth of the charges lodged in the present indictment or to show bad character, or to show a propensity toward criminal conduct. Also, remember that you may consider this evidence, if at all, only against the defendant who was allegedly involved in the similar acts and not against the other defendants, Benson and Danise.

During summation there was reference to where a certain witness Mr. Brito was and to the fact that he was not called to testify. In a federal criminal trial both the Government and the defense are entitled to receive from the Clerk of the Court a subpoena calling for the attendance of a witness, and no matter where the witness lives in the United States, he is required to appear when served with the subpoena.

Now, Mr. Brito could have been called by either side as a witness, so that from the failure of either side to call him you might infer that his testimony might have been unfavorable to either the Government or to a defendant, but it is equally within your discretion to draw no inference at all from the failure of the Government or a defendant to call that witness.

You should bear in mind, however, that there is no duty upon either side to call a witness whose testimony would be merely cumulative of testimony already in evidence.

You have heard testimony in this case of a defendant using another name. If you find beyond a reasonable doubt that a defendant used names other than his own in order to avoid identification, then that would be a fact from which you may, but need not, infer a consciousness of guilt on his part.

Now, the attorneys in the case have entered into several stipulations. Of course, stipulations are binding on the parties who agree to them. When the attorneys stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard the fact as proved.

As I mentioned earlier in my remarks to you, anything that counsel for the Government or for the defense may have said with respect to matters in evidence, whether during the trial, in argument or in summation, is not evidence in the case.

So too, anything the Court might have said during the trial or during the course of these instructions is not evidence. This case must be decided by you solely on the basis of the sworn testimony of the witnesses and such exhibits as were received in evidence.

I have attempted to avoid any comment that might suggest any personal views of mine on the evidence or

on the credibility of witnesses, inferences to be drawn, or the importance of one part of the testimony as compared with another, and no comment by me has been so intended. The actions of the court during the trial in ruling on motions or objections are not to be taken by you as any indication of the guilt or innocence of the defendant. These are matters of procedure and law, with which you have no concern.

From time to time, conferences at the bench out of your hearing were conducted at the request of the attorneys for the Government or for the defense. These were conferences solely on questions of law which it is my duty to decide. You are not to draw any inferences against either side to this controversy for requesting such conferences, because an attorney would be remiss in his duty to his client if he did not protect his interests in the manner provided by law which it is my function to decide.

Let me point out that the duty of imposing sentence in the event of a guilty verdict rests exclusively with the Court. The punishment which may be inflicted upon a defendant must never be considered by you in any way in arriving at an impartial verdict as to the guilt or innocence of the of the accused.

Now, the purpose of your deliberations is to exchange views with your fellow jurors, to discuss a nd consider

the evidence, to listen to each others' arguments, to present your own views and to reach a unanimous verdict based solely and wholly on the evidence, if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. Do not hesitate to reexamine your views and to change your opinion when, after discussion, it appears to be in error. But if after carefully considering all of the evidence in the case and the arguments of your fellow jurors, you hold a conscientious view which differs from the others, you are not to yield your view simply because you are outnumbered. Your final vote must reflect your objective and deeply thought out determination of the issues.

If, in the course of your deliberations, you need to examine any of the exhibits, desire any of the testimony to be redd, or find that you are uncertain as to the meaning of any part of the Court's instructions, you may send a note to the Court asking for whatever will clear up any of the questions you may have. In communicating with the Court, however, I should admonish you that you should not indicate how your vote may then be divided.

Your oath sums up your duty, and that is without

fear or favor to anyone, you will well and truly try the issues between this defendant and the Government of the United States based solely upon the evidence and the Court's instructions as to the law.

It is important to the Government; it is important to the defendant.

Will counsel approach the side bar.

(At the side bar.)

THE COURT: Any exceptions?

MR. EPSTEIN: Defendant Benson takes exception to the Court's charge on conspiracy; that one can conspire to commit either a criminal act, an offense against the United States or an illegal association to do an unlawful act.

It is the defendant Benson's contention that one can only be held accountable for a conspiracy to commit a crime pursuant to 18 U.S.C. 371.

The defendant Benson takes exception to the Court's charge that certain inferences can be drawn from one's acts and conduct. These acts all require a specific intent and therefore the jury should not be charged as to what inferences can be drawn merely from acts and conduct, Court of Appeals in U.S. v. Bertolotti, 529 F. 2nd.

Defendant Benson also takes exception to your

Honor's charge on the availability of certain witnesses.

MR. MITCHELL: Your Honor, there is one other thing I would like to -- it is no exception to the charge and no request, but it may be that during the jury's deliberation the documents may come in from California and if they do, I would like to have them substituted for the stipulation.

THE COURT: I don't see how you can do that.

MR. GOLDBERG: We agreed and stipulated, your Honor, if the telex of the Customs declaration comes in, Mr. Levine --

THE COURT: I didn't hear it on the record.

(In open court.)

(Alternates excused.)

(Marshal sworn.)

(Jury left to commence deliberations.)

MR. GOLDBERG: Your Honor --

THE COURT: I have no objection to your substituting it if it is on the record, but I just don't recall the stipulation being made on the record.

MR. GOLDBERG: May I say something to your Honor?

THE COURT: Yes.

MR. GOLDBERG: If I am not supported by Mr. Levine

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
vs.	
HARRY LEVINE BENSON et al.,	75 Crim 538
Defendants.	

New York, N. Y.

May 10, 1976 - 3:20 p.m.

Before

HON. CHARLES H. TENNEY,

District Judge.

APPEARANCES:

ROBERT B. FISKE, JR., Esq.,
United States Attorney for the Southern District of New York
ALAN LEVINE, Esq.,
Assistant United States Attorney

GILBERT EPSTEIN, Esq.,
Attorney for Defendant Benson

- - -

THE COURT: Mr. Benson, do you have a lawyer?

MR. EPSTEIN: Good afternoon, your Honor.

Your Honor, for the defendant Harry Benson, Gilbert Epstein, of the firm of Stockman & Epstein, 100 Church Street.

I have spoken to Mr. Benson this morning in this matter, and I have agreed to represent him in connection with this case.

THE COURT: Did he tell you when the case was scheduled for trial?

MR. EPSTEIN: I spoke to Mr. Benson, and I also spoke to Mr. Levine before court reconvened this afternoon, and I understand your Honor has tentatively set this matter down for the 24th of this month.

THE COURT: That is the latest I can do it. It had been set down for the 17th, and I think one week is too short a time to prepare, but I think you can prepare it in two weeks.

MR. EPSTEIN: What I have arranged to do, I have arranged to meet Mr. Levine tomorrow morning in his office and try to get whatever matters we can voluntarily agreed upon between ourselves.

THE COURT: If there is going to be any difficulty about it, I will be here, and I can straighten it out for you, straighten out any matter, but I am under so much pressure

JHP

with the criminal cases, and I can't put it over more than a week on my present schedule.

Unfortunately, your client has been a fugitive for a year.

MR. EPSTEIN: I quite frankly had come to court this afternoon with the intention of asking your Honor whether or not it would be feasible to put this case on for the following week, June 1st. I realize it is a short week, because we do have Memorial Day that Monday.

THE COURT: Well, I am afraid I can't. It is not that complicated a case, to my knowledge of it.

MR. EPSTEIN: No. The only thing I do now know is from having discussed the case with both opposing counsel, as well as my client, and looking at the indictment, apparently some of the principal witnesses are foreign nationals, who reside overseas, and, of course, that does put it somewhat on a different footing than most of these cases normally are.

Normally, even if we are dealing with foreign nationals, they are normally in custody to some degree and can be made available for interviews by opposing counsel.

THE COURT: I don't know when -- I assume the Government has made some arrangement to have them here for the data set, namely, the 17th. If that is the case, they would be available, I assume, for interview by the defendant.

MR. EPSTEIN: I will try to iron it out with Mr. Levine as well.

THE COURT: Can you work it out, Mr. Levine, with Mr. Epstein?

MR. LEVINE: Yes, your Honor.

THE COURT: Is the 24th satisfactory?

MR. LEVINE: Yes; it is, your Honor.

THE COURT: Very well. Then the trial date will be the 14th, unless the courthouse falls down.

MR. EPSTEIN: In which case, your Honor, I will have my week's adjournment.

THE COURT: Yes.

MR. LEVINE: Can we try the case out of doors, your Honor?

THE COURT: All right. Thank you, gentlemen.

MR. EPSTEIN: Thank you, your Honor.

- - -

MICHAEL P. STOKAMER*
GILBERT EPSTEIN
COUNSELORS AT LAW

*MEMBER NEW YORK AND NEW JERSEY BAR

100 CHURCH STREET
NEW YORK, N. Y. 10007
(212) 962-1564

A 58

May 13th, 1976

BEST COPY AVAILABLE

Honorable Charles H. Jenney
United States District Judge
United States Courthouse
Foley Square, New York 10007

Re: United States v. Harry Levine Benson, et al 75cr. 538

Honorable Sir:

I respectfully request that your honor schedule a pre-trial conference pursuant to rule 17.1 of the Federal Rules of Criminal Procedure to resolve several outstanding matters concerning Discovery and Demand for Particulars that opposing Counsel can not resolve.

The Government has declined to provide defense counsel with a list of the witnesses it intends to call on it's case-in-chief. The policy of the Government in this area is not only shortsighted but clearly in conflict with the pronouncements of the Court of Appeals. In United States v. Cannone, 528 F.2d 296 (2d Cir. 1975), Our Court of Appeals held that District Courts have the authority, subject to Appellate Review, to compel the Government, prior to trial, to disclose the identity of it's witnesses.

"...The most potent argument for compulsory disclosure of the identity of the prosecution's witnesses is that, without the benefit of such disclosure, the defense may be substantially hampered in it's preparation for trial. At a minimum, pre-trial ignorance of the identity of the prosecution's witnesses tends to detract from the effectiveness of the defense's objections and cross-examination. Although continuances which tend to mitigate the detrimental effects of unpreparedness, are sometimes obtainable, not only are they merely a partial solution to the problem of unpreparedness but, in addition, their prolongation of trials is of course costly to both the Government and the defendant..."

In the instant case, no continuances will be available to counsel to allow additional time to prepare a defense for reasons which the court has already set forth. The Government has informed opposing counsel that no electronically intercepted communications are available in this case

and it believes there are no consentual tapes of any electronic communications. Thus the credibility of the witnesses for the prosecution will be the main focus of the defense, and to prepare it is essential that a list of the Government's witnesses be turned over to defense counsel.

In United States v. Baum 482 F 2d 1325,1332 (2d Cir. 1973) the Court of Appeals in reversing a conviction of possession of stolen property because of the Government's failure to reveal the identity of a witness prior to his taking the stand said:

"...A defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to his defense. The failure to reveal Greenhalgh's identity until he was presented as a witness confronted the trial Judge with the hard choice of interruption of the trial or denial to the defense of a reasonable opportunity of meeting the severe impact of this aspect of the prosecutor's evidence. Such tactics were condemned and called for the reversal in United States v. Kelly 420 F 2d 26,29 (2d Cir. 1969)..."

The need for the Government to disclose the identity of it's witness is all the greater in a case such as this where those witnesses may be foreign nationals residing outside the United States and the time required to investigate these people and their stories would make it impossible to grant a continuance during the trial for this purpose.

I request that the court order the Government to turn over to opposing counsel copies of the court records and psychiatric records of any of its witnesses prior to their taking the stand. United States v. Badalamente, 507 F 2d 12,21 (2d Cir. 1974). It is also requested that the court compel opposing counsel to provide the defense with the record of all prior instances of misconduct that any of the prosecution's witnesses were involved in. These instances of misconduct in the past, whether they resulted in a criminal conviction or not, all have a bearing on a witness' credibility. The credibility of the various witnesses for the prosecution may very well prove to be, as I expect it will, the cornerstone of the defense, and the vast distances that have to be covered to obtain this information coupled with the short period of time available to defense counsel make it imperative that the Government make this material available prior to trial. United States v. Miles 480 F 2d 1215, 1217 (2d Cir.1973).

I have not been able to conclude my pre-trial preparation to date and there may be matters that I and other defense counsel may wish to bring to the Court's attention at a future date as the requests set forth in this letter are not inclusive.

Thanking you in advance for your cooperation in this matter, I remain

Respectfully yours,

STOKAMER & EPSTEIN, ESQS.
By: Gilbert Epstein, Esq.

GE:cmr
cc: cont. next page

A 60

MICHAEL P. STOKAMER*
GILBERT EPSTEIN
COUNSELORS AT LAW

100 CHURCH STREET
NEW YORK, N. Y. 10007

(212) 962-1564

*MEMBER NEW YORK AND NEW JERSEY BAR

May 21st, 1976

Honorable Charles H. Tenney, U.S.D.J.
United States Courthouse
Foley Square
New York, New York 10007

Re: United States of America v.
Harry Levine Benson, et al.
75 Cr. 538

Honorable Sir:

I am taking the liberty of writing to you with regard to the above-captioned matter to request that the Court re-consider my application for a continuance in this case until June 14th, 1976.

My client, Harry Benson Levine, came before the court for the first time on Friday, May 7th, 1976. I was subsequently retained and appeared before your Honor as counsel of record for Mr. Benson on Monday, May 10th, 1976. In preparing the case I retained the services of a private investigator and attorney in Zurich, Switzerland.

The difficulty from the outset has been that I did not know exactly what information existed in Switzerland concerning this matter and Mr. Hans Buhler, my investigator, first had to conduct a general background check of Mr. Buhler, which was very time consumming as I did not even have an address for Mr. Buhler in Switzerland. It was not until this week, the week of May 16th, that the attorney that I had retained overseas had sufficient informaiton on which he could go to court to try and have the material released. The material will then have to be attested to and certified to conform with the requirements of Rule 44 of the Federal Rules of Civil Procedure and 28 U.S.C. 1741. To date, I have received no material from either party in Switzerland.

This past Tuesday, May 18th, I received from the Government an address for Mr. Buhler that he used in late 1974, and I do not know if it is still his residence. In seeking to expedite matters, the Government, at your Honor's direction, made Mr. Buhler available for an interview on Thursday, May

20th in the United States attorney's office. Mr. Buhler who appeared with his attorney, Mr. Winard, declined to answer any of my questions and I then served him with a subponea doces tecum, a copy of which is enclosed with this letter.

I concluded my brief encounter with Mr. Buhler and the Government then turned over to me a document prepared by the Swiss authorities setting forth a few details of an interview they had with Mr. Buhler on January 15th, 1975. In this document, a copy of which is also enclosed herein, reference is made to several pending cases against Mr. Buhler. I spoke to assistant U.S. Attorney Alan Levine this morning and asked him what if anything he knew about these pending investigations against Mr. Buhler and he replied that he knew nothing about them.

Mr. Buhler's credibility or lack of credibility is of critical importance in this law suit, and these pending charges against Mr. Buhler bear directly on his motive to testify in an attempt to gain the goodwill of the American Authorities. United States v. Miles 480 F 2d 1215, 1217 (2d Cir. 1973) and would be admissible under Rule 404 (b) of the Federal Rules of Evidence.

It is impossible to obtain this material in time for the trial of this case on May 24th, 1976 because of the Government's refusal to make this material available to opposing counsel and the distance and time involved in trying to obtain it from Switzerland. I request that this matter be continued for a reasonable amount of time to allow counsel the opportunity to obtain this material.

Thanking you in advance for your cooperation in this matter,

I remain,

Respectfully yours,
STOKAMER & EPSTEIN, ESQS.

GILBERT EPSTEIN, ESQ.

CC: Alan Levine, Esq.
United States Attorney's office
One St. Andrews Plaza
N.Y., N.Y. 10007

Jay Goldberg
299 Broadway
N.Y., N.Y. 10007

Robert Mitchell, Esq.
51 Chambers Street
N.Y., N.Y. 10007

Subpoena to Produce Document or Object — Cr. Form No. 21 (Rev. 5-68)

United States District Court

FOR THE

A 62

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

HARRY LEVINE BENSON, et al.

No. 75 Cr. 538 (CHT)

To HANS BUHLER
EHGIMATTSTR 22
8002 ZURICH, SWITZERLAND

You are hereby commanded to appear in the United States District Court for the SOUTHERN District of NEW YORK at FOLEY SQUARE, NEW YORK (Rm. 705) in the city of NEW YORK on the 24th day of May 1976 at 10:00 o'clock A.M.

to testify in the case of United States v. HARRY LEVINE BENSON and bring with you

All documents, including, but not limited to, passports, visas, etc., reflecting all trips made by you across a national border between June 1st, 1974 and February 1st, 1975. All Bank records, including, but not limited to bank statements and cancelled checks and bank books for the period of time from June 1st, 1974 to June 5th, 1975. All records, including, but not limited to, checks, customs declarations and appraisals for a 9.88 Karat diamond and a 8.35 karat emerald. All tax returns, tax declarations and any tax forms prepared by or on behalf of Hans Buhler for any Government for the calendar year 1974 and 1975.

This subpoena is issued upon application of the[1] Defendant HARRY LEVINE BENSON

May 19th, 19 76.

RAYMOND F. BURGHARDT, Clerk

By _____, Clerk.
Deputy Clerk.

Gilbert Epstein, Esq.
Attorney for Benson
100 Church Street-18th Floor
Address (212)962-1564

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at 100 Church Street, NYC on May 19th, 1976 and on May 20th, 1976 at One St. Andrew's Plaza served it on the within named Hans Buhler by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.[2]

Dated: _____, 19____

By _____

Service Fees
Travel _____$

May Dpt. 1976

A 63

Hans Bühler

In response to my verbal invitation, Hans Bühler came to the office of DK II at 9:00 a.m. on Thursday, January 16, 1975. At that time, I asked him a few questions for the record. In this regard, I am making reference to the enclosed transcript of questioning. Concerning Hans Bühler's alleged diplomatic passport, I am making reference to the copy of my report of January 20, 1975, to the Zurich Police Command.

Hans Bühler claims that half of the diamond (9.88 carats, E cut) belongs to him and the other half belongs to a company whose name he does not wish to reveal. Hans Bühler claims that he obtained the Colombian emerald (8.35 carats, excellent quality, excellent color, emerald polish) in India in October 1974, but he has not yet paid the purchase price. He also claims that he had consigned this emerald, along with the diamond, to Herbert Kaminsky.

Furthermore, Hans Bühler told me that on August 13, 1974, he was attacked by three thieves in Bogota, Colombia, and was subsequently robbed of U. S. $110,000 in cash. This matter was reportedly investigated by the local police in Bogota.

During our conversation, Hans Bühler told me in passing that he would have to file for bankruptcy if, in regard to the Harry Levine Benson matter, he did not get the money or the gems were not found.

Hans Bühler has previously committed several offenses. The following offenses are noted in the criminal records of the Canton of Zurich:

February 23, 1960 - Representative's Office in Horgen; violation of the motor vehicle code; fined 60 Swiss francs and put on probation for 1 year.

Entry removed in accordance with Federal Council decision of November 22, 1960.

October 5, 1960 - District Court in Zurich; misuse of identification papers and credentials; fined 200 Swiss francs.

December 1, 1961 - District Court in Horgen; repeatedly driving without a driver's license; incarcerated for 20 days and fined 200 Swiss francs.

April 22, 1964 - District Court in Baden; violation of the traffic code;

March 15, 1966 - October 22, 1965 Superior Court of the Canton of Zurich/District Court in Horgen; embezzlement; sentenced to 1 month in prison, suspended; placed on probation for 4 years.

Suspension of sentence revoked on October 16, 1970.

September 26, 1969 - Cantonal Judicial Board in Chur; embezzlement, using confiscated articles, falsifying records, fraud, failure to obey an official order, violation of traffic regulations; sentenced to 8 months in prison, not suspended.

On March 23, 1971, Hans Bühler began serving the sentences passed on March 15, 1966, and September 26, 1969. He was incarcerated in Pfäffikon District Prison and Regensdorf Penitentiary. After serving two-thirds of his sentence, he was released on

September 22, 1971, and put on supervised probation for two years.

At the present time, Hans Bühler is being investigated by the Office of the Examining Magistrate in Chur due to a serious violation of traffic regulations.

In his neighborhood in Zurich 2 and at Rennweg 30 in Zurich 1, where Hans Bühler maintains an office, he is considered an honest man. He is always proper and friendly. Hans Bühler is supposedly late in paying his rent on occasions.

Hans Bühler's financial relationships are extensive and clear. Several cases against him have been pending at the Prosecutor's Office in Zurich 2.

Due to his previous offenses and the numerous incriminating files at the Zurich Police Command, Hans Bühler must be regarded as a shady character.

A 66

Emil Baumann

PRIVATDETEKTIV-BÜRO

Ehem. Pol.-Gfr. der Stadtpolizei Zürich

Mitglied des Fachverbandes Schweizerischer Privat-Detektive / Sektion des schweizerischen Gewerbeverbandes / Angeschlossen der Internationalen Kommission der Detektivverbände (IKD)

Geschäft:
Goldackerweg 4, 8047 Zürich
01 / 54 99 88

Privat:
Goldackerweg 6, 8047 Zürich
01 / 52 27 06

Bank: Schweiz. Bankgesellschaft
Agentur Zürich-Altstetten

Postcheckkonto 80 - 214 36

Mr. Gilbert Epstein
Lawyer
c/o Stokamer & Epstein
100 Church Street, 18th floor
New York City N.Y. 10007

USA

Ihre Referenz: Ihr Brief vom:

Zürich, 19. Mai 1976

Betrifft : Durchführung von Erhebungen betreffend Herrn Hans-Heinrich Bühler, geb. 11. November 1935, von Thalwil-ZH, Gemmologe, geschieden von Miryana geb. Konoplic, wh: Engimattstrasse 22, Zürich 2, Wng.

Sehr geehrter Herr Rechtsanwalt Epstein,

im Anschluss an Ihren telefonisch erteilten Auftrag sind über Herrn Hans-Heinrich Bühler umfangreiche Erhebungen durchgeführt worden, die zusammenfassend zu folgendem Ergebnis geführt haben:

Herr Hans-Heinrich Bühler eröffnete vor Jahren in seiner Eigenschaft als Gemmologe ein Geschäft für den Handel mit Edelsteinen und bis vor ungefähr einem halben Jahr hatte er den Sitz im Hause Rennweg 30, Zürich 1. Anschliessend wechselte er das Geschäftsdomizil an die Löwenstrasse 40, Zürich 1.

Am 26. September 1970 verheiratete sich Herr Bühler mit Frl. Miryana Konoplic, geb. 1. August 1943, doch ist diese Ehe am 22. Oktober 1974 wieder geschieden worden. Der Vater von Frau Miryana Konoplic geschiedene Bühler ist ein in Zürich ansässiger Edelstein-Grosshändler mit Geschäftssitz an der Bahnhofstrasse 73, Zürich 1, wo seine Tochter auch wieder mitarbeitet.

	Einkommen	Vermögen
1974	Fr. 25'700.--	-/-
1975	Fr. 32'100.--	Fr. 38'000.--

Von den Amtsstellen werden bezüglich erlittener Vorstrafen keine Auskünfte erteilt. Dagegen wäre Herr Hans-Heinrich Bühler berechtigt, über sich selbst beim Zentralstrafregister in Bern einen Auszug zu verlangen, der ihm auch ausgestellt würde und in dem alle strafrechtlichen Vorgänge aufgeführt sind, sofern solche vorliegen.

Von privater Seite - nämlich aus dem Bekanntenkreis des Herrn Hans-Heinrich Bühler - ist wiederholt darauf hingewiesen worden, dass Herr Hans-Heinrich Bühler im Jahre 1966 wegen Urkundenfälschung und Veruntreuung zu einer bedingten Gefängnisstrafe von 1 Monat durch das Obergericht des Kantons Zürich verurteilt worden ist. In einem anderen Strafverfahren ist Herr Hans-Heinrich Bühler - wiederum wegen Urkundenfälschung und Veruntreuung - durch das Kantonsgericht Graubünden im Jahre 1969 zu einer unbedingten Gefängnisstrafe von 8 Monaten verurteilt worden, wobei er dann die bedingt ausgesprochene Strafe aus dem Jahre 1966 ebenfalls noch verbüssen musste. Aufgrund guter Führung wurde Herrn Bühler, der seine Strafe in der kantonalen Strafanstalt Regensdorf verbüsste, ein Drittel der Strafzeit erlassen.

Von dritter Seite ist wiederholt darauf hingewiesen worden, dass Herr Hans-Heinrich Bühler in beruflichen Kreisen sehr gut bekannt ist, und er sei heute bestrebt, sich einen guten Namen zu schaffen und sein unruhiges Leben früherer Jahre zu stabilisieren.

Herr Werner Barth vom gleichnamigen Uhren- und Bijouteriegeschäft an der Bahnhofstrasse 94, Zürich 1, Telefon 25 68 66, ist zufolge eines Auslandaufenthaltes erst ab Dienstag, den 25. Mai 1976, wieder in Zürich erreichbar, so dass er nicht befragt werden konnte, ob er im Juni oder Juli 1974 Herrn Hans-Heinrich Bühler einen lupenreinen Diamanten mit einem Gewicht von 9,88 Karat verkauft hat, der von diesem bar bezahlt worden sein soll. Herr Widmer, Stellvertreter des Geschäftsinhabers, erwähnte auf Befragen, dass ihm in dieser Hinsicht überhaupt nichts

bekannt sei. Ein lupenreiner Diamant mit einem Gewicht von 9,88 Karat repräsentiere immerhin einen Handelswert von ungefähr Fr. 400'000.-- und ein solcher Verkauf komme nicht jedes halbe Jahr zustande.

Mit vorzüglicher Hochachtung

CONFEDERATION
CANTON AND CITY OF ZÜRICH
CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

ss:

I, Walter A. Hayden Jr., XXXX Consul of the United States of America at Zürich, Switzerland, duly commissioned and qualified, do hereby certify that on this

20 th day of May, 19 76,

before me personally appeared

Emil Baumann

to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument, and being informed by me of the contents of said instrument, he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and year last above.

Walter A. Hayden Jr.
Consul of the United States
of America at Zürich, Switzerland
duly commissioned and qualified

A 70

Emil Baumann

Private Detective Bureau

Formerly with the Zurich Police

Member of the Swiss Private Detective Organization/ Section of the Swiss Chamber of Commerce/ Associated with the International Commission of Detective Organizations (IKD)

Business:
Goldackerweg 4, 8047 Zurich
01/54 99 88

Residence:
Goldackerweg 6, 8047 Zurich
01/52 27 06

Bank: Schweiz. Bankgesellschaft
Zurich-Alstetten Agency

Post check acct. 80-214 36

19 May 1976

Gilbert Epstein, Esq.
c/o Stokamer & Epstein
100 Church Street, 18th Floor
New York, NY 10007

Re: Review of proceedings against Mr. Hans-Heinrich Buhler, born 11 November 1935, of Thalwil -ZH, Gemologist, divorced from Miryana nee Konoplic, Enghalde strasse 22, Zurich 2, Whg.

Dear Mr. Epstein:

Pursuant to your telephoned request extensive inquiries were made with respect to Mr. Hans-Heinrich Buhler. The results can be summarized as follows:

Mr. Hans-Heinrich Buhler in his capacity as a gemologist opened a business in precious stones some years ago which until about half a year ago was located at Rennweg 30, Zurich 1. At that time the business was moved to Lowenstrasse 40, Zurich 1.

On 26 September 1970 Mr. Buhler married Miss Miryana Konoplic, born 1 August 1943, but they were divorced on 22 October 1974. Her father is a Zurich wholesaler of precious stones whose business is located at Bahnhofstrasse 73, Zurich 1, where his daughter is again employed.

	Income	Assets
1974	25,700 Francs	-/-
1975	32,100	38,000

A 71

The authorities do not release any information about convictions. On the other hand, Mr. Hans-Heinrich Buhler has the right to demand a transcript about himself from the Central Penal Registry in Bern, which would be provided him, and in which all criminal proceedings, if any, would be set forth.

From private sources, namely from the circle of acquaintances of Mr. Hans-Heinrich Buhler, it has been determined, and reference thereto is often made, that in 1966 Mr. Hans-Heinrich Buhler received a one month sentence from the Superior Court of the Canton of Zurich for forgery and embezzlement. suspended R.S. In another criminal proceeding in 1969 the Cantonal Court of Graubunden pronounced absolute sentence--again for forgery and embezzlement--of eight months on Mr. Hans-Heinrich Buhler, to which the previous suspended sentence was added. The time was served in the Regensburg Cantonal Penitentiary with one third time off for good behavior.

Third parties often mention that Mr. Hans Heinrich Buhler is well known in professsional circles, that he now strives to rehabilitate himself and to stabilize his former restless existence.

Mr. Werner Barth of the watch and jewelry firm of the same name at Bahnhofstrasse 94, Zurich 1, Telephone 25 68 66, on account of a trip abroad, will not be available in Zurich until Tuesday 25 May 1976, so that he can not be asked whether he sold to Mr. Hans-Heinrich Buhler a pure diamond weighing 9.88 karats, in June or July 1974, for cash. Mr. Widmer, the representative of the owner of the business, in answer to questions, said he knew nothing about it. A pure 9.88 Karat diamond would have a market value of about 400,000 Francs--and such a sale doesn't occur every six months.

Yours sincerely,

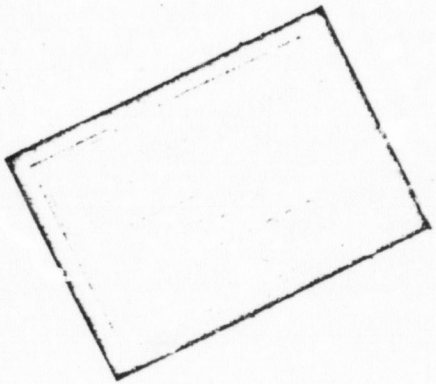
/s/

(Signature certified (in English)
by the U.S. Consul, Zurich)

Richard Schoen

Translated from the German by Richard Schoen

A 72



LUFTPOST
PAR AVION VIA AEREA



Mr. Gilbert Epstein
Lawyer
c/o Stokamer & Epstein
100 Church Street, 18th floor
USA - New York City, N.Y. 10007

Postfach 3215 Zürich 23

Postfach 3215 8023 Zürich



A 73

BOSSONG STATIONERY CO., INC., 28 WARREN STREET, NEW YORK, N.Y. 10007

A74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	AFFIDAVIT
-against-	:	75 Cr. 538 (CHT)
HARRY LEVINE BENSON, et al. Defendants	:	

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK

GILBERT EPSTEIN, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the United States District Court for the Southern District of New York with Offices at 100 Church Street, City and County of New York. I am the Attorney of Record for the Defendant Harry Levine Benson and I am making this affidavit in support of his application for a continuance to secure the testimony of a critical witness.

2. On Thursday, May 27th, 1976, at approximately 10:00 a.m. I was notified by telephone that my investigator Emil Baumann, formerly with the Zurich Police had interviewed Werner Barth of the Watch and Jewelry firm of the same name, located at Bahnhofstrasse 94. All efforts to interview Mr. Barth prior to this time were unavailing because Mr. Barth was abroad and did not return to Zurich until Tuesday, May 25th. The investigator sought to convey this information to me yesterday, but he called while I was in Court and my Office would not accept the calls.

3. Mr. Barth, who has been identified by HANS HEINRICH BUHLER, as the dealer from whom he purchased a 9.88 Karat Diamond in June, 1974, told my investigator the following: "I know BUHLER and I have bought and sold stones to him in the past, but I never sold him a 9.88 Karat Diamond or any stone of that size..."

4. Mr. Baumann does not speak English and I do not speak German and all our communications have been through an english-speaking interpreter, who further informed me that Mr. Baumann conducted the interview of Mr. Barth personally.

Dated: New York, New York
May 27th, 1976

GILBERT EPSTEIN

Sworn to before me this
day of May, 1976.

Emil Baumann

PRIVATDETEKTIV-BÜRO

Ehem. Pol.-Gfr. der Stadtpolizei Zürich

Mitglied des Fachverbandes Schweizerischer Privat-Detektive / Sektion des schweizerischen Gewerbeverbandes / Angeschlossen der Internationalen Kommission der Detektivverbände (IKD)

Geschäft:
Goldackerweg 4, 8047 Zürich
01 / 54 99 88

Privat:
Goldackerweg 6, 8047 Zürich
01 / 52 27 06

Bank: Schweiz. Bankgesellschaft
Agentur Zürich-Altstetten

Postscheckkonto 80 - 214 36

A. 75

Mr. Gilbert Epstein
Lawyer
c/o Stokamer & Epstein
100 Church Street, 18th floor
New York City N.Y. 10007

USA

Ihre Referenz: Ihr Brief vom: Zürich, 28. Mai 1976

Betrifft : Nachtrag
zu meinem Bericht vom 19. Mai 1976
betreffend Durchführung von Erhebungen über Herrn Hans-Heinrich Bühler.

Sehr geehrter Herr Rechtsanwalt Epstein,

nach Erhalt meines schriftlichen Berichtes vom 19. Mai 1976 teilten Sie telefonisch mit, dass Herr Werner Barth vom gleichnamigen Uhren- und Bijouteriegeschäft an der Bahnhofstrasse 94, Zürich 1, nach dessen Rückkehr aus dem Ausland noch persönl. befragt werden sollte, ob es zutrifft, dass er im Juni oder Juli 1974 einen lupenreinen

Diamanten mit einem Gewicht von 9,88 Karat an Herrn Hans-Heinrich Bühler verkauft habe, der von diesem dann bar bezahlt worden sein soll.

Am Mittwoch, den 26. Mai 1976, 1115 Uhr, habe ich im Uhrengeschäft Barth an der Bahnhofstrasse 94 vorgesprochen und Herrn Werner Barth zu diesem Punkt persönlich befragen können. Herr Werner Barth äusserte sich mir gegenüber wie folgt:

" Ich kenne Herrn Hans-Heinrich Bühler sehr gut, denn ich stehe schon seit langer Zeit mit ihm in geschäftlicher Verbindung. Es ist aber so, dass ich von Herrn Bühler Edelsteine kaufe und nicht umgekehrt. Es ist mehrmals vorgekommen - allerdings nicht oft - dass ein Kunde in meinem Laden erschienen ist und einen Diamanten oder Brillanten zum Kauf anbot oder denselben eintauschen wollte. In solchen Situationen hatte ich mich dann mit Herrn Bühler in Verbindung gesetzt und ihn gefragt, ob er am Kauf eines offerierten Steines interessiert sei und über mich hatte Herr Bühler dann wiederholt eine solche Möglichkeit ausgeschöpft und einen Stein gekauft. Diese Preise bewegten sich in einem Rahmen von ungefähr Fr. 10'000.-- bis Fr. 30'000.--, doch auf keinen Fall höher.

Es stimmt nicht, dass Herr Bühler jemals einen Diamanten von 9,88 Karat bei mir gekauft hat. "

Herr Barth bestätigte ebenfalls, dass ein lupenreiner Diamant von 9,88 Karat einen Handelswert von Fr. 400'000.-- repräsentiere.

A 77

BEST COPY AVAILABLE

SWISS CONFEDERATION
CANTON AND CITY OF ZÜRICH
CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

ss:

I, Walter A. Hayden Jr., ~~XXXX~~ Consul of the United States of America at Zürich, Switzerland, duly commissioned and qualified, do hereby certify that on this

28 th day of May, 1976,

before me personally appeared

Emil Baumann

to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument, and being informed by me of the contents of said instrument, he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and year last above written.

Walter A. Hayden Jr.
Consul of the United States
of America at Zürich, Switzerland
duly commissioned and qualified

Emil Baumann

Private Detective Agency

Formerly with the Police, City of Zurich

Member of the Swiss Private Detective Organization/Section of the Swiss Chamber of Commerce/Associated with the International Commission of Detective Organizations (IKD)

Office:
Goldackerweg 4, 8047 Zurich
01 / 54 99 88

Home:
Goldackerweg 6, 8047 Zurich
01 / 52 27 06

Bank: Schweiz. Bankgesellschaft
Zurich-Altstetten Agency

Postcheckkonto 80-214 36

A 78

Gilbert Epstein, Esq.
c/o Stokamer & Epstein
100 Church Street, 18th Floor
New York, NY 10007

28 May 1976

Re: Addendum
to my report of 19 May 1976
re proceedings against Mr.
Hans-Heinrich Buhler

Dear Mr. Epstein:

After receipt of my written report of 19 May 1976 you requested of me by telephone that Mr. Werner Barth of the watch and jewelry firm of the same name, Banhofstrasse 94, Zurich 1, after his return from abroad be personally interviewed as to whether he sold in June or July 1974 a pure diamond weighing 9.88 karats to Mr. Hans-Heinrich Buhler, which the latter was said to pay for in cash.

On Wednesday 26 May 1976 at 11:15 hours I visited the Barth watch firm at Bahnhofstrasse 94 in order to interview Mr. Werner Barth personally in this regard. Mr. Werner Barth stated the following:

" I know Mr. Hans-Heinrich Buhler very well, as I have had business connections with him over a long period of time. However it is I who buy precious stones from Mr. Buhler and not the other way around. It sometimes happens that a customer appears at my store--but not often--with a diamond or other jewel to sell or which he wants to trade. On such

A 79

occasions I communicated with Mr. Buhler and asked him whether he was interested in the purchase of an offered stone, and through me Mr. Buhler repeatedly made use of such an opportunity and bought a stone. These prices fluctuated between about 10,000 francs and 30,000 francs, but in no case higher.

It is not the case that Mr. Buhler ever bought a 9.88 karate diamond from me."

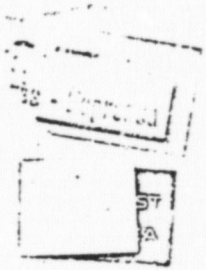
Mr. Barth likewise stated that a pure 9.88 karatn diamond would represent a market value of 400,000 francs.

With best regards,

/s/ Emil Baumann

(Signature certified (in English) by the United States Consul at Zurich, Walter Hayden Jr., 28 May 1976)

Translated from the German, 2 June 1976 by Richard Schoen





Herrn

Gilbert Epstein

Lawyer

c/o Stokamer & Epstein

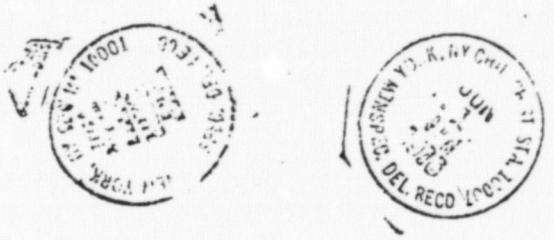
100 Church Street, 18th floor

New York City N.Y. 10007

USA

A 60

E. Baumann, Goldackerweg 4, CH - 8047 Zürich



A-81

A 82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

HARRY LEVINE BENSON, et al.

Defendants.

NOTICE OF MOTION TO PERPETUATE TESTIMONY

75 Cr. 538 (CHT)

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Gilbert Epstein, Esq., and the exhibits attached thereto, the defendant, Harry Levine Benson, will move this Court, by and through his counsel, before the Hon. Charles H. Tenney, U.S.D.J. in the United States Courthouse, Foley Square, City and County of New York, on Wednesday, June 30th, 1976 in Room 1904 for an order to perpetuate the testimony of Werner Barth, at a deposition to be held in Zurich, Switzerland, on a date set by the Court, pursuant to Rules 27 (b), 28 (b) and 32 (a) (3) of the Federal Rules of Civil Procedure.

Dated: New York, New York
June 22nd, 1976

Yours etc.,

STOKAMER & EPSTEIN, ESQS.
Attorney for the Defendant
Harry Levine Benson
100 Church Street
New York, New York 10007
(212) 962 - 5031

So Ordered

Robert B. Fiske, Jr., Esq.
United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Attn: Alan Levine, Esq.

Jay Goldberg, Esq.
299 Broadway
New York, New York 10007

Robert Mitchell, Esq.
51 Chambers Street
New York, New York 10007

Clerk
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

A84

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

HARRY LEVINE BENSON, et al.

Defendants.

AFFIDAVIT

STATE OF NEW YORK] ss.:
COUNTY OF NEW YORK]

GILBERT EPSTEIN, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the United States District Court for the Southern District of New York with offices at 100 Church Street, City and County of New York. I am making this affidavit in support of the defendant Benson's motion to perpetuate the testimony of Werner Barth.

2. All statements herein are on information and belief unless otherwise stated.

3. The witness Hans Heinrich Buhler testified that he purchased a 9.90 Karat diamond from Werner Barth (page 331 of the transcript), and that this was the stone that was taken from him in December 1974.

4. On May 27th, 1976, your deponent stated to the Court that he had been informed by a private investigator that he had retained in Switzerland that Mr. Barth had told the investigator that he

never had sold to Buhler a 9.8 karat diamond (page 484 of the transcript).

5. Your deponent had tried to have Mr. Barth interviewed prior to the trial by his investigator Emil Baumann in Switzerland, but Mr. Baumann stated, under oath, that as of May 19th, 1976, Mr. Barth was not in Zurich, that he was on a trip abroad, and would not return to Zurich until Tuesday, May 25th, 1976. (Exhibit 1).

6. On Thursday, May 27th, 1976, your deponent learned that Mr. Baumann had interviewed Mr. Barth and that Mr. Barth had stated that he bought stones from Buhler, and not vice-versa. Barth stated that infrequently customers appear at his store with diamonds or other stones to sell or trade. On these occassions, Barth said, he would ask Buhler if he were interested and Buhler repeatedly bought these stones. Mr. Barth stated the prices for these stones ranged between 10,000. to 30,000. francs, but that Buhler never bought a 9.88 karat diamond from him. This information was brought to the Court's attention by your deponent, by affidavit, on May 28th, 1976.

7. My investigator has set down, in a sworn statement, the interview he had with Mr. Barth in Zurich on May 26th, 1976 (Exhibits 2 and 2A), as set forth in paragraph six.

8. This request is made so that Mr. Barth, who is willing to be examined, can be examined under oath by Counsel

for both sides, and his testimony can be before the Court pursuant to Rule 103 (a) of the Federal Rules of Evidence to assist the Court when the Court will pass upon the defendant Benson's motion to set aside the verdict under Rule 29 (c) of the Federal Rules of Criminal Procedure.

WHEREFORE, it is respectfully requested that the Court issue an order perpetuating the testimony of Werner Barth by taking his deposition in Zurich, Switzerland at a time to be fixed by the Court.

GILBERT EPSTEIN

Sworn to before me this
22nd day of June, 1976.

A. 86-88

TRY
within is a
clerk of the within
19

urs, etc.
PSTEIN

Address
REET
10007

MENT
ler
hich the within is a
tlement to the
ned Court, at
19

s, etc.
STEIN
ddress
EET
007

Index No. 75 Cr. 538 Year
(CHT)

UNITED STATES DISTRICT CO
SOUTHERN DISTRICT OF NEW

UNITED STATES OF AMERICA

- against -

HARRY LEVINE BENSON, et a

Defendants.

NOTICE OF MOTION TO PERP
TESTIMONY

STOKAMER & EPSTEIN

Attorneys for
Office and Post Office Address
100 CHURCH STREET
NEW YORK, N. Y. 10007
(212) 962-1504

To

Attorney(s) for

Service of a copy of the within

is h

Dated,

Attorney(s) for

Endorsement

Motion denied. There has been no showing that the witness is willing to testify by deposition nor that his testimony, if admitted, would be material to the matters at issue in this proceeding. United States v. Bronston, 321 F. Supp. 1269 (S.D.N.Y. 1971).

So ordered.

U.S.D.J.

Dated: New York, New York
July 13, 1976.

JUL 13 1976

ss.:

l to
eby
jury

ore-

e is
the
ion
ves
his

at-
fol-

Subpoena to Produce Document or Object — Cr. Form No. 21 (Rev. 5-68)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

A 87

UNITED STATES OF AMERICA

v.

HARRY LEVINE BENSON, et al.

No. 75 Cr. 538 (CHT)

To I. Sollazzo
Room PS
Building 80-John F. Kennedy International Airport
Jamaica Queens

You are hereby commanded to appear in the United States District Court for the Southern District of New York at U.S. Courthouse, Foley Sq. (Rm. 705) in the city of New York on the 28th day of May 1976 at 10:00 o'clock A.M. to testify in the case of United States v. Harry Levine Benson and bring with you

The file maintained by your agency on HANS HEINRICH BUHLER, D.O.B. 11/11/35, Swiss National, residing at Engimattstr 22, 8002 Zurich W/M. Copies of any declarations to customs made by HANS HEINRICH BUHLER upon entering the United States in June, 1974 at John F. Kennedy International Airport and on December 11/12, 1974 at Los Angeles, California

This subpoena is issued upon application of the[1] Defendant Harry Levine Benson

May 27th, 19 76.

Gilbert Epstein, Esq.
Attorney for Benson
100 Church St., N.Y.C.
Address (212) 962-1564

RAYMOND F. BURGHARDT, Clerk
By M. C. Benson, *Deputy Clerk*

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at 100 Church Street on May 27th, 1976 and on at served it on the within named by delivering a copy to and tendering to the fee for one day's attendance and the mileage allowed by law.[2]

Dated: ,

, 19 By ,

Service Fees
Travel $
Services

A 88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

HARRY LEVINE BENSON, et al.,

Defendants.

----------x

NOTICE OF MOTION TO SET ASIDE VERDICT

75 Cr. 538 (CHT)

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of GILBERT EPSTEIN, Esq., the defendants, HARRY LEVINE BENSON and HERBERT KAMINSKY, will move, by and through their respective counsel, before the HON. CHARLES H. TENNEY, United States District Judge, in the United States Courthouse at Foley Square, City and County of New York on Wednesday, August 25, 1976, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order setting aside the jury verdict entered on June 2, 1976.

Dated: New York, New York
August 20, 1976

Yours, etc.,

STOKAMER & EPSTEIN
Attorneys for Defendant
Harry Levine Benson
Office & P. O. Address
100 Church Street
New York, New York 10007
(212) 962-1564

TO: ROBERT B. FISKE, JR.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Att: ALAN LEVINE, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

HARRY LEVINE BENSON, et al.,

Defendants.

AFFIDAVIT

State of New York)
(ss.:
County of New York)

GILBERT EPSTEIN, being duly sworn, deposes and says:

1. I am the attorney of record for the defendant, HARRY LEVINE BENSON, and I am making this affidavit in support of his motion to set aside the jury verdict entered on June 2, 1976.

2. All statements herein are on information and belief unless otherwise stated.

3. The defendant, HARRY LEVINE BENSON, was arraigned on this indictment on Friday, May 7, 1976, and I was retained as counsel on Monday, May 10, 1976. The Court set the matter down for trial on Monday, May 24, 1976. I stated to the Court on the 10th that I would do everything possible to be ready but many, if not all, the witnesses resided in Switzerland, and I could not represent that I would be ready by the 24th of May. My request for a continuance until the first week in June, 1976 was denied.

4. In the course of my pre-trial preparation, I engaged the services of a private investigator in Switzerland to assist me. I obtained a copy of Hans Bühler's examination before trial in a companion civil suit and learned from it that he bought the diamond in question from a dealer in

Switzerland by the name of Barth who was located on the Bahnhofstrasse in Zurich. I notified my investigator to interview Mr. Barth concerning the time, terms and conditions of the sale of a 9.88 karat diamond to Buhler. My investigator replied, by letter, dated May 19th, that Mr. Barth was on a trip abroad and would not return to Zurich until Tuesday, May 25, 1976. Mr. Barth was interviewed upon his return to Zurich and on Thursday, May 27th, your deponent notified the Court that Mr. Barth denied having sold a 9.88 karat diamond to Hans Buhler. The Court stated that Barth's testimony would be highly material on the issue of Buhler's credibility (pages 489 and 490 of the record). The Court, however, later reversed itself and denied the defendant, Benson's, request for a continuance, stating that there was no inconsistency between Buhler's testimony and Barth's proposed testimony (Page 636 of the transcript). The record, however, discloses that Buhler testified, on cross-examination, that he bought the 9.88 karat diamond and a second diamond from Mr. Barth and that he had called Mr. Barth during the night of May 25 - May 26, 1976, while he was testifying, to confirm his recollection of this transaction (Page 331 of the transcript). The Government, moreover, had placed into evidence as Government's Exhibit 4, the cashier's check purchased by Buhler to be used for the purchase of the 9.88 karat diamond and a second diamond, and across the front of the receipt in Buhler's handwriting was the name "BARTH" (Pages 119-121 of the transcript).

5. In light of Buhler's pinpointing of Barth as the seller of the 9.88 karat diamond and the clarity of his recollection emphasized by Buhler's phone call to Barth while on the witness stand, Barth's testimony would have been devastating to the Government's key witness, Buhler. The

Court was notified by your deponent on May 13, 1976 that the cornerstone of the defense for Mr. Benson was going to be the credibility of the Government's witnesses, and this position was set forth again in counsel's letter of May 21st to the Court.

6. In Washington v. Texas, 388 U.S. 14, 19, 22 (1967), Chief Justice Warren, writing for the majority of the Court, stated:

> " . . . The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the Jury so it may decide where the truth lies. Just as an accused had the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own defense. This right is a fundamental element of due process of law. . . the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the Jury or by the Court . . . "

Here Barth's testimony was relevant and material to the proceedings.

7. The absence of any customs declaration by Buhler for a stone of that size and value made Barth's testimony all the more crucial. The inability of the Government to obtain Buhler's customs declaration of December 1974 until after he had been excused as a witness, resulted in the defense being denied the opportunity to confront Buhler with the declaration and either have him admit he smuggled the stones, an offense which carries a maximum penalty of five (5) years' imprisonment and a fine of up to ten thousand ($10,000.00) dollars (18 U.S.C. 545), or have him admit that he made a false statement on a customs declaration, a crime

which carries a maximum penalty of two (2) years' imprisonment and/or a fine of up to five thousand ($5,000.00) dollars; or have him admit that he did not bring the stone, the 9.88 karat diamond into the country. The third alternative or explanation would, of course, coincide with Mr. Barth's testimony about his never having sold a 9.88 karat diamond to Buhler. Moreover, Buhler's failure to declare the diamond when he passed through customs is totally inconsistent with the stated purpose of his trip, i.e., to have the stone examined by GIA in Los Angeles, because a diamond being brought into the country to be tested is admitted duty free under a bond (19 U.S.C. 1202, Subtitle I, Schedule 8, Item 864.30).

8. In Ungar v. Sarafite, 376 U.S. 575, 589 (1964), Mr. Justice White wrote:

> " . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality . . . the five days notice given petitioner was not a constitutionally inadequate time to hire counsel and prepare a defense to a case in which the evidence was fresh, the witnesses and the evidence readily available, the issues limited and clear cut and the charge revolving about one statement made by Ungar during a recently completed trial."

In this case, the evidence was not fresh, the events in question having occurred in December, 1974 and January, 1975, and Mr. Benson was not arraigned in this case until May, 1976. The witness, Werner Barth, was not readily available. Barth, a Swiss national, with an office in Zurich was not in Switzerland when your deponent first sought to have him interviewed, and did not return to Zurich until May 25th, and his testimony was crucial to the issue of Buhler's credibility, who was the only Government witness against my client. Barth would have testified, according to my

investigator's sworn affidavit, that:

> " I know Mr. Hans-Heinrich Buhler very well, as I have had business connections with him over a long period of time. However, it is I who buy precious stones from Mr. Buhler and not the other way around. It sometimes happens that a customer appears at my store -- but not often -- with a diamond or other jewel to sell or which he wants to trade. On such occasions I communicated with Mr. Buhler and asked him whether he was interested in the purchase of an offered stone, and through me Mr. Buhler repeatedly made use of such an opportunity and bought a stone. These prices fluctuated between about 10,000 francs and 30,000 francs, but in no case higher. It is not the case that Mr. Buhler ever bought a 9.88 karat diamond from me."

II.

The defendants Harry Levine Benson and Herbert Kaminsky were convicted of violating 18 U.S.C. 1343. The wire fraud statute was not violated by the conduct of the accused or their co-defendant. The verdict on Counts I and II of the indictment should be set aside.

18 U.S.C. 1343 provides that, "whoever having devised . . . any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of a wire . . . in interstate or foreign commerce any . . . sounds for the purpose of executing such scheme . . . shall be fined not more than $1,000 or imprisoned not more than five years or both." Congress, by this statute, sought to punish those who used the telephone, in interstate or foreign commerce, to execute a scheme to defraud. The testimony in this case indicates that all foreign or interstate phone calls were not undertaken in execution of the scheme to defraud. The scheme to defraud was completed in the space of a few minutes at the initial meeting

of Buhler with the defendants. All the calls that occurred subsequent to the completed fraudulent scheme were, at best, made for the purpose of concealing the fraudulent scheme, but not to execute the scheme.

Those phone calls that were made on December 23, 1974 by Hans Buhler to Switzerland to Hans Fuhrer and James Brito were not made for the purpose of executing the fraudulent scheme. Herbert Kaminsky and Harry Levine Benson were unknown to both Fuhrer and Brito. Brito, according to the testimony, believed that Buhler was in New York City trying to sell certain small stones that were listed on a telex sent to Mary Anne Denise in New York City.

Buhler testified that he inquired about Mary Ann Denise by asking various people here in New York City about her reputation and one of those individuals said he had heard about her textile organization (pages 434 and 435 of the transcript).

Buhler stated Hans Fuhrer called him in New York City and told Buhler to get in touch with Mary Ann Denise (page 445 of the transcript), but that when calls were placed from New York City to Switzerland, Buhler testified that he could not recall mentioning any names to James Brito (page 452 of the transcript). Moreover, Buhler, insofar as Hans Fuhrer and James Brito knew, was going to see Mary Ann Denise to discuse certain diamonds, but not the 9.8 karat diamond (pages 574 and 576 of the transcript).

In United States v. Maze, 414 U.S. 395, 400, 402 (1974), the Supreme Court overturned the conviction of Thomas Maze under 18 U.S.C. 1341, the mail fraud statute. Maze had used a stolen credit card at various out-of-state establishments which had then mailed the invoices back to the Kentucky bank that had issued the card. Mr. Justice Rehnquist wrote:

> " Under the statute the mailing must be for the purpose of executing the scheme . . . Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss . . . ".

Here the plan was completed when Buhler turned over the stones to the defendants. The plan did not call for the defendants to do anything further. Any activities that transpired after the first meeting in New York City between the accused and the defendants was not undertaken to execute the scheme charged in the indictment.

Since the conduct of the accused did not violate 18 U.S.C. 1343, the Court erred in charging the jury that the defendants could be found guilty of conspiracy, 18 U.S.C. 371, if the jury found that they had used the telephone in interstate or foreign commerce to execute a fraudulent scheme. The law is clear that:

> " . . . when a case is submitted to the jury on alternate theories the unconstitutionality of any of the theories requires that the conviction be set aside."

Leary v. United States, 395 U.S. 6, 31-32 (1969); United States v. Rodriguez, 465 F.2d 5, 10 (2nd Cir. 1972).

The Court had no jurisdiction over Count II and its improper submission to the jury tainted Count I. Price v. Georgia, 398 U.S. 323, 331, 332 (1970).

III.

The defendants Harry Levine Benson and Herbert Kaminsky were convicted of violating 18 U.S.C. 1343 and 2314. The accused were convicted for having defrauded Hans Buhler of a valuable diamond.

The evidence at the trial shows that Hans Buhler was not the lawful

owner or custodian of the 9.88 karat diamond. The stone, if it ever entered the country at all in December, 1974, was contraband. The diamond was in the country illegally and thus its subsequent taking by the accused by stealth or fraud did not bring their conduct within the purview of 18 U.S.C. 1343 or 2314.

The legislative history of 18 U.S.C. 2314 indicates that it was directed to protect citizens who, if somewhat gullible, were nonetheless in lawful possession of their property. Then Attorney General Herbert Bromwell, Jr. wrote to the Speaker of the House of Representatives on January 31, 1955 concerning the need for legislation as currently found in 18 U.S.C. 2314. He wrote:

> " One of the more extensive activities of the confidence man is often directed toward retired businessmen and their families or individuals of some prominence in the community who are reluctant to report their gullibility . . . "
> 1956 U.S. Code, Cong. and Adm. News, pp. 3036, 3037.

The legislation was framed to protect the lawful possession of property. It would be outrageous to suggest that those who acquire the goods of others by theft or illegal design are to be protected in their possession by the enactments of our National Congress.

In United States v. Handler, 142 F.2d 351, 353 (2nd Cir. 1936), the Court stated in a case where the victim had her property taken from her by the defendant's fraudulent statements, including a promise to marry,

" 'stealing', which has no common law definition to restrict its meaning as an offense is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership . . . ".

In this case, the ownership of the 9.88 karat diamond was not rightfully vested in Hans Buhler as exhibited by the fraudulent customs declaration filed by Buhler upon his entering the country at Los Angeles.

WHEREFORE, it is respectfully requested that the Court issue an Order setting aside the verdict of June 2, 1976 and dismiss the indictment for the reasons set forth herein.

GILBERT EPSTEIN

Sworn to before me this
22nd day of August, 1976.

JANE CUCCURULLO
Notary Public, State of New York
No. 24-6030435
Qualified in Kings County
Commission Expires March 30, 1978

hplt

therefore Mr. Kaminsky will be in custody, if that's the case, when he is not in the courtroom.

MR. GOLDBERG: Your Honor--

THE COURT: We will swear in the witness and have him testify to it. You can cross examine him, if you want.

MR. LEVINE: Your Honor, the witness will be here this morning. He is not here now. He was supposed to be here by 11 o'clock.

THE COURT: We are still missing a juror.

MR. GOLDBERG: Can I find out, your Honor, who he is? Is he in custody now, just so I have an idea?

MR. LEVINE: When he is here, you will know who he is.

The government has been reluctant throughout this trial to make the names of its witnesses available and indeed less than 24 hours after it made the name of this witness available, the life of this witness was threatened.

MR. GOLDBERG: So you claim. You weren't there.

MR. LEVINE: That is correct.

MR. EPSTEIN: Your Honor, I have an application. I called your chambers this morning to indicate the nature in broad terms.

This morning I received a phone call from my

hplt

investigator in Switzerland and at that time I was informed they had had the opportunity had had interviewed a new jeweler by the name of Barth.

Mr. Barth based on the telephone conversation I had indicated, that he knew Hans Buhler, he had done jewelry business with Hans Buhler, buying and selling of stones.

Furthermore, he indicated, which I consider to be most important, that he had never at any time sold Hans Buhler a large stone and had never sold to Hans Buhler a 9.8 karat diamond.

It is interesting to note in this case that at the present time there are no declarations from our Customs showing this material was ever brought into the United States or was ever declared to United States Customs.

THE COURT: I was wondering why the government did not produce that. I would think it would be available to the government.

MR. EPSTEIN: So would I , your Honor. I took the liberty to call the Customs Service this morning, Mr. Greenberg in their legal services, this morning. Mr. Greenberg indicated in general if you came in with a large valuable precious stone, the procedures that would be followed, the declaration made, the bond posted to insure

the United STates government would receive the import duties, and I have done everything I could to obtain the document.

It seems to me in this case when the government served notice for readiness of trial, these documents should have been secured and all searches should have been completed a long time.

THE COURT: Let's not jump to assumption of fact. You are assuming that such documents exist and the government is suppressing them.

MR. EPSTEIN: No, Judge.

THE COURT: You said they should have been made available.

MR. EPSTEIN: Either that or --

THE COURT: I read that only as a charge there there has been suppression. I'm afraid that you may be talking a little ahead of yourself. There is no reason why you cannot comment on the absence of these documents.

MR. LEVINE: Or, your Honor, for that matter, cross examine the witness, as they have, as to what he indeed filed.

The government has represented it has made an effort to get the document, the document is certainly within the subpoena powers of the defendants to get, the government

has no obligation to prove its case to a mathematical certainty and the defendants are invited to comment on the failure of the government to prove on any --

MR. GOLDBERG: Judge, if Mr. Levine knows that these documents do not support the witness' statement -- I cannot believe the work done in Switzerland and New York they do not know at this moment, with the case pending a year and a half, whether there are such documents.

If there are no documents as I suspect there are not, the government would have an obligation to correct what Mr. Buhler said.

THE COURT: If Mr. Buhler smuggled this property in and it was still his property, it might not alter the complexion of this case, except going to his credibility and possibly his moral background.

MR. LEVINE: Your Honor, just to foreclose one issue that has been raised --

THE COURT: You can steal a smuggled article as well as one that was legitimately --

MR. LEVINE: Exactly, your Honor. And the suggestion here that the government, particularly the Assistant United States Attorney has any knowledge about the documents other than what has been propounded on the witness stand, is false. I want to make that very clear

hplt

for the record.

I know as much as what the defendants know.

THE COURT: I have indicated that they are overstepping the bound of propriety in making that accusation.

MR. EPSTEIN: The Swiss Police have conducted a very thorough investigation as to the allegation of Mr. Buhler in January, 1975, and I would tend to --

THE COURT: I didn't know you had been there.

MR. EPSTEIN: I haven't been there. I am talking about the documents that are here. My passport isn't even valid anymore. It expired.

It would seem to me the Swiss Police would have conducted an investigation of Mr. Barth, the jeweler, in Zurich from whom Mr. Buhler allegedly obtained this precious stone.

If there are any reports as to the investigation of Mr. Barth, that should have been made available to us a long time ago. Mr. Barth's testimony is crucial in the case for the --

THE COURT: Bring him over.

MR. EPSTEIN: Judge, twofold:

Mr. Barth is an elderly gentleman in poor health; point one -- it is easy to laugh about it , Judge,

but this is a fact with which I am confronted.

The only thing I can do with the man is take a deposition and to have enough time to take one, is either grant a continuance, or the declaration of a mistrial. It would take me, Judge -- I can have my passport approved in 48 hours if I had a ticket, and spend at least three days, one day coming, going and one day being there.

The point is, Judge, the indictment alleges two stones and specifies a 9.88 karat diamond, and an 8.35 emerald. For the emerald there is no documentary proof that it entered the United States or was examined in the United States or was ever seen in the United States by anybody except for the testimony of Mr. Buhler.

As to the 9.88 diamond, if you recall Mr. CRowningshield's testimony, he only saw that stone once in June of 1974, and he was very adamant that it had a yellow tint and it was an "F" grade.

Mr. Goldberg examined him about it, "Was it greenish?" And he said "No." He said the stone was examined in June and --

THE COURT: Save some of this for summation.

MR. EPSTEIN: Judge, Mr. Barth's testimony, if made available to this jury in the form of a deposition, would be extremely valuable to bring before this Court and

to this jury to show in fact that the allegation which Mr. Buhler has made here are in fact not so.

He has taken a stone of great value and testified he sold it for very little money. I have reason to believe from the examination of the grand jury minutes that Mr. Sachs will testify that as a result of the sale of the stone Mr. Buhler was obligation to pay commission--

THE COURT: Please. All Mr Barth can testify to is that he didnot sell any such stone to Hans Buhler, so let's not go into all the other things.

Possibly the government, through somebody in Switzerland, can confirm this and so stipulate on the record.

MR. GOLDBERG: Judge, doesn't this take on added importance if you have the absence of Customs --

THE COURT: Please, let's not go into that. We have already covered that. I prefer the record to be made in the courtroom and not in the robing room.

MR. LEVINE: Your Honor, it seems to the government that all of the arguments that are being made here are defendants' arguments for summation on the adequacy of the government's proof or the lack thereof.

THE COURT: All I am saying is, a statement by Mr. Barth to the effect that he never sold this diamond to

Mr. Buhler or through Mr. Buhler -- Buhler said he bought it from him -- would be highly material, certainly on the issue of credibility.

I just don't like to be in a position of granting a continuance, but I would not believe that the government's case would be completed by the end of this week, the way we are humming along. Monday is a holiday. Tuesday we would sit, Wednesday we would not.

I am prepared to grant a reasonable continuance, two weeks or anything like that, to get an answer one way or another, on ont point, after the government has rested.

Now, I will leave it up to the government how they want to proceed.

MR. LEVINE: Your Honor, can the government be heard before a continuance is granted?

THE COURT: I haven't granted it yet. I said I would consider doing it at the end of the government's case. You have not finished the case, have you?

MR. LEVINE: No, your Honor.

In the government's view, a continuance is unnecessary and within the Court's broad discretion to grant or deny continuances ,there is no reason for one and the defendants have, number one, failed to make an adequate showing to the Court under the law in this Circuit why this

hplt

individual was not contacted before today which is the fourth day of trial and why indeed no effort was made at a prior time.

Secondly, they have made no motion. To ask for a continuance to do work which should have been done long before the trial commenced, is another ground for not granting a continuance.

THE COURT: I am speaking solely to the application made of counsel who has been appointed two weeks or almost three weeks ago.

MR. LEVINE: The fault of that late appointment, your Honor, is neither the Court's nor the government's.

MR. GOLDBERG: Judge, with respect to my failure to make motions, unless I am mistaken, unless the government knew of Barth's --

THE COURT: Please, let's not have two counsel overstepping.

There is no evidence that has been presented so far as I know, that the government was ever aware of Mr. Barth's statement that he never sold this to Mr. Buhler.

MR. LEVINE: Absolutely, your Honor.

THE COURT: You make all these accusations against the government for suppressing material without anything to back it up. I think it is highly improper.

MR. EPSTEIN: Judge, I believe I put on the record earlier, Mr. Barth has not been in Switzerland for the last several days. Mr. Barth was out of the country and I had no reason to believe he was in the United States.

According to my information, he returned to Switzerland late on Wednesday.

THE COURT: He was in the United States?

MR. EPSTEIN: I don't believe he was. My information is he was not. My information was he returned to Switzerland on Wednesday and was interviewed late on Wednesday, Swiss time. Thursday in Switzerland, I have been informed by my investigator, that is a national holiday and everything is closed.

I have done everything I can to get Mr. Barth. I haven't delayed.

THE COURT: I have suggested the possible procedure that would avoid any continuance whatsoever.

MR. MITCHELL: Your Honor, I have a request on an entirely different subject.

I understand that Mr. Herbert Sachs is going to be called as possibly the next witness, is that correct?

MR. LEVINE: That is correct.

MR. MITCHELL: Mr. Sachs has an attorney-client relationship with Mrs. Danise and I have been reading his

A 108

MICHAEL P. STOKAMER*
GILBERT EPSTEIN
COUNSELORS AT LAW

100 CHURCH STREET
NEW YORK, N. Y. 10007
(212) 962-1564

*MEMBER NEW YORK AND NEW JERSEY BAR

Wednesday, July 14th, 1976

Alan Levine, Esq.
United States Attorney's Office
One St. Andrew's Plaza
New York, New York 10007

Re: United States of America v. Harry Levine Benson, et al. 75 Cr. 538

Dear Sir:

I request that you send to me a copy of the Customs declaration prepared by Mr. Hans Buhler in December, 1974 upon his entry into the United States at Los Angeles, California as per our agreement of May 28th, 1976.

Thanking you in advance for your cooperation in this matter, I remain

Respectfully yours,
STOKAMER & EPSTEIN

GILBERT EPSTEIN

GE:cmr
Honorable Charles H. Tenney
United States Courthouse
Foley Square
New York, New York 10007

Jay Goldberg, Esq.
299 Broadway
New York, New York 10007

Robert Mitchell, Esq.
51 Chambers Street
New York, New York 10007

A 169

Bühler Hans
3/22/1909 Pat 121
Switzerland Switzerland
Sonnenbergstr 8? 8500 Thurgau Switzerland
721 Fieldcrest Ave., Dundee, Ill. 60118
Bertha Bühler, wife

BEST COPY AVAILABLE

A 110

DESCRIPTION OF ARTICLES	CUSTOMS USE ONLY
EA812—10	
Attach Continuation Sheets if Necessary	
TOTAL PRICE	

ACTUALLY PAID. If not purchased, state fair price in country where obtained. You may combine articles costing $1 or less each as MISCELLANEOUS up to a total of $20. List separately all articles over $1 in cost.

U.S. GPO: 1974-526-626

waste of a liquid nature, including the necessary intercepting sewers, outfall sewers, pumping, power, and other equipment, and their appurtenances and includes any extensions, improvements, remodeling, additions, and alterations thereof. The conference agreement is the same as the House amendment.

The Senate bill defined "interstate waters" to mean all rivers, lakes, and other waters that flow across, or form a part of State boundaries. The conference agreement (which is the same as the House bill) defines the term to mean all rivers, lakes, and other waters that flow across, or form a part of boundaries between two or more States.

Section 4 (of the bill): Section 4 of the conference agreement is the same, except for certain date changes, as the Senate bill. It was not included in the House bill.

This section relates to promulgation of "Federal shares" for purposes of section 5 of the amended Water Pollution Control Act (relating to grants to State and interstate agencies for their water pollution control programs) for the first 3 years.

Section 5 (of the bill): Section 5 of the conference agreement was not included in the Senate bill. It preserves the legality of any Federal action relating to abatement of interstate pollution already begun under the existing law.

Section 6 (of the bill): This section contains a short title for the bill. It is the same as the House amendment (which differed from the Senate bill only in the date).

JOHN A. BLATNIK,
ROBT. E. JONES,
JOHN J. DEMPSEY,
By JOHN A. BLATNIK,
GEO. A. DONDERO,
J. HARRY MCGREGOR,
Managers on the Part of the House.

CONFIDENCE GAME SWINDLES

For text of Act see p. 572

Senate Report No. 987, July 18, 1955 [To accompany S. 997]

House Report No. 2474, June 26, 1956 [To accompany S. 997]

The House Report is set out.

House Report No. 2474

THE Committee on the Judiciary, to whom was referred the bill (S. 997) to provide punishment for certain confidence game swindles, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to amend section 2314 of title 18, United States Code, by the addition of new language which

would provide punishment for the utilization of interstate commerce in the perpetration of confidence game swindles. The new paragraph would provide that whoever, having devised or intending to devise a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations, or promises, transports or causes to be transported or induces any person to travel in, or be transported in interstate commerce in the execution or concealment of a scheme to defraud that person of money or property of a value of $5,000 or more would be punished under the terms of section 2314.

STATEMENT

Section 2314 of title 18, United States Code, in its present form provides for the punishment of persons who transport in interstate commerce goods, wares, securities, or money of the value of $5,000 or more knowing that such items were stolen, converted, or taken by fraud. The section also provides for the punishment of persons who transport in interstate commerce forged, altered, or counterfeited securities, or articles used in counterfeiting. However, the present law does not contain provisions making it possible to prosecute for interstate transportation of persons in the perpetration of confidence games.

The Attorney General has recommended the enactment of this proposed legislation. His recommendation was contained in executive communications directed to both Houses of Congress. The Attorney General's communication is as follows:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., January 31, 1955.

The SPEAKER,
House of Representatives,
Washington, D. C.

DEAR MR. SPEAKER: The Department of Justice recommends enactment of legislation to provide punishment for the utilization of interstate commerce in the perpetration of confidence game swindles and a draft of a bill to carry out this recommendation is attached for your consideration and appropriate action.

Existing law provides punishment, in section 2314, title 18, United States Code, for the transportation in interstate commerce of goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud. This section also includes other paragraphs providing punishment for transportation in interstate commerce of certain articles used in counterfeiting. The statute, however, fails to afford means to prosecute for interstate transportation of persons in the perpetration of confidence games.

One of the more extensive activities of the confidence man is often directed toward retired businessmen and their families or individuals of some prominence in the community who are reluctant to report their gullibility. This reluctance on the part of the victim, together with the element of the scheme set up by the confidence man to lead the victim to believe that his money will be returned, causes a delay in the reporting of the violation to the authorities. This delay permits the confidence man to move to another section of the country, dispose of the money or property taken from the victim, and thus destroy the necessary evidence to establish certain elements of the crime.

In many of the major confidence swindles perpetrated by professional confidence men the victims are located when they are away from home. After inducing the victim to participate in some false stock market or racetrack transaction, the confidence man induces the victim to return

to his home, obtain the necessary money and return to the scene of the swindle where the money is turned over to the operator. After the money has been turned over to the confidence man, the victim is instructed to go to another city where he is to receive the return on his "investment." Such moving of the victim is a part of the scheme and gives the confidence man time in which to dispose of the money or property taken in the swindle and to flee to a distant "cool-off" spot.

Section 2314 of title 18 may be appropriately amended by the insertion of a new paragraph to supply the needed means to punish the perpetrators of this type of swindle.

This legislation in the identical form here suggested was introduced in both the Senate and House of Representatives in the 83d Congress as S. 3441 and H.R. 8914. S. 3441 was passed by the Senate on August 11, 1954, and referred to the House Committee on the Judiciary on August 16, 1954.

The Bureau of the Budget has advised that there is no objection to the submission of this legislation.

Sincerely,

HERBERT BROWNELL, JR.,
Attorney General.

Each year many of our citizens are cheated by confidence men. As observed in the Attorney General's communication to the Congress, in many instances the targets of these unscrupulous criminals have been retired persons, widows and also business and professional men. These people lose large sums of money to this group of criminals. The committee is of the firm conviction that our laws must be kept at a peak level of effectiveness in order to deal with these criminals, and protect honest citizens from their operations.

In combating this sort of criminal activity, the Department of Justice has found that our present Federal laws are inadequate when it comes to dealing with the criminal who utilizes travel by the victim in the perpetration of the scheme to defraud that individual of his money. Such criminals avoid prosecution under the mail fraud statutes (sec. 1341 U.S.C., title 18) by not using the mails. Also delay on the part of the victim in reporting his being hoaxed makes prosecution under the present provisions of section 2314 of title 18 for the transportation in interstate commerce of money taken from the victim more difficult. Delay makes it possible for the criminal to move far from the scene of the swindle, and dispose of the money which constitutes the necessary evidence to establish elements of the crime.

This proposed legislation is intended to remedy this present lack in the law. Few people carry on their persons the large amounts of money sought by these confidence men, and it is therefore necessary for the victim to travel in interstate commerce to his home in order to get the money for the false venture described by the confidence man as a part of the scheme. This travel by the victim not only serves to provide a means of carrying the money to the criminal by the agency of the victim himself, but because the victim is induced to travel away from home the time incident to his travel and return may also occasion an additional delay which can be used by the criminal to escape from the scene.

A 114

AGRICULTURE—SEEDS

The committee recognizes the need for the amendment proposed by this bill, and agrees with the position taken by the Attorney General in this matter. Accordingly, this committee recommends that the bill be favorably considered.

AGRICULTURE—SEEDS

For text of Act see p. 573

Senate Report No. 1701, Mar. 22, 1956 [To accompany S. 1688]

House Report No. 2473, June 26, 1956 [To accompany S. 1688]

The House Report is set out.

House Report No. 2473

THE Committee on Agriculture, to whom was referred the bill (S. 1688) to amend the Federal Seed Act, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

This bill would amend the penalty provisions of the Federal Seed Act in two respects:

(1) Require that in order to constitute a criminal offense seed misbranding must be done "knowingly, or as a result of either gross negligence or failure to make a reasonable effort" to determine pertinent facts and,

(2) Provide a civil penalty payable to the United States for any violation of the act or regulations, whether with or without intention.

Hearings were held on H. R. 6201 by Mr. Dague, H. R. 6203 by Mrs. Knutson, and H. R. 6219 by Mr. Lovre, all similar to S. 1688.

At the hearings, the measure was supported by the Department of Agriculture and by spokesmen for various associations of seed dealers. Following is the text of the Senate report on the bill:

> This bill would remove the criminal penalty for inadvertent violation of the Federal Seed Act where no criminal intent is present, and provides a civil penalty for such violation. Under existing law shippers of seed may be subject to criminal penalty and the stigma attached thereto if they fail to make a proper analysis and certification of the seed shipped. Your committee feels that this is unnecessarily strict. The language of the bill was worked out by your committee with the seed trade and the Department of Agriculture, and is satisfactory to all.
>
> Sections 2, 3, and 4 of the bill, which would be added by committee amendments, contain technical amendments required as a result of the substantive changes made by the first section of the bill.
>
> The committee amendments are fully explained by the attached letters from the Department of Agriculture.

OCT 12 1976

Emil Baumann

PRIVATDETEKTIV-BÜRO

Ehem. Pol.-Gfr. der Stadtpolizei Zürich

Mitglied des Fachverbandes Schweizerischer Privat-Detektive / Sektion des schweizerischen Gewerbeverbandes / Angeschlossen der Internationalen Kommission der Detektivverbände (IKD)

- A115

Geschäft:
Goldackerweg 4, 8047 Zürich
01 / 54 99 88

Privat:
Goldackerweg 6, 8047 Zürich
01 / 52 27 06

Bank: Schweiz. Bankgesellschaft
Agentur Zürich-Altstetten

Postcheckkonto 80 - 214 36

Mr. Gilbert Epstein
Lawyer
c/o Stokamer & Epstein
100 Church Street, 18th floor
New York City N.Y. 10007

USA

Ihre Referenz: Ihr Brief vom:

Zürich, 6. Oktober 1976

Dear Sir,

our answer to your request your letter of August 27th instant, states that there is a Mr. Hans Bühler, residing at Sonnenberg 57, Thalwil, born on 22 March 1909, married to Berta, neé Tanner, and they have been living there since 1949.

It is true that Mr. Bühler and his wife were in the U.S.A. and quite frequently in Los Angeles to visit their daughter, son - in - law and grand - children, who were living in Los Angeles. They were there during September - October 1970 as per your photo - copy shows.

The above Mr. Bühler was not in the U.S.A. in December of 1974. His eldest son, Hans M. Bühler Jr. was and it was he who flew from London to and Los Angeles and was subsequently robbed of two precious stones worth US$ 255'000.--

A116

in New York, by H. Benson Levine, Herbert Kaminsky and Mari-Ann Danise. (Included is a photo-copy of one of his Hotel bills in Los Angeles at this time.)

The original ticket from Zürich, London, Los Angeles is deposited at the office of the FBI and is now with the U.S. Attorney, Mr. Alan Levine.

As per your request for a photograph from Mr. Bühler, senior or junior, we must inform you that under Swiss law, one is not permitted to take unauthorised photographs of an individual without permission and here it has been denied.

Best regards

...CONFEDERATION
...TON AND CITY OF ZÜRICH
...SULATE GENERAL OF THE
...ED STATES OF AMERICA

ss:

I, John G. Gilmore, ~~XXXX~~ Consul ... United States of America at Zürich, Switzer... duly commissioned and qualified, do hereby ...y that on this

8 th day of Okt., 19 76

...re me personally app...ared

Emil Baumann

...e personally known, and known to me to be the ...idual__ described in, whose name is ...scribed to, and who executed the foregoing ...trument, and being informed by me of the content... said instrument, he duly acknowledged to ... that he executed the same freely and ...tarily for the uses and purposes therein ...ned.

...WITNESS WHEREOF I have hereunto set my ...d and official seal the day and year last a... ...en.

REQUEST NO. 4

INFERENCES FROM FALSE TESTIMONY

In considering the evidence in this case you must consider the carriage, behavior, bearing, manner and appearance of a witness. The words used by a witness are by no means all that we are to rely on in making up our minds about the truth of the matter before us. The jury may and indeed should take into consideration the whole nexus of sence impressions which they get from a witness. Moreover such evidence as the hearing and manner of a witness may well satisfy you not only that the witness testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation discomfort, arrogance or defiance as to give assurance that the witness is fabricating and that if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougall, 201 F 2d 265, 269 (2d Cir. 1952).

had been tested in June of 1974, they communicated on several occasions with GIA contesting the "F" rating which they had given the color clarity of--

THE COURT: He didn't say communicating with Crowningshield.

MR. MITCHELL: Yes, he did, your Honor.

THE COURT: Show me the testimony.

MR. EPSTEIN: Very well, your Honor, I will go back through it. I can't give you the page right now. The last matter I have concerns use, custom service. I ascertained yesterday from the customs service the individual in charge of valuable gems at the airport in Kennedy is a Mr. Soloso, and I sent my investigator out this morning for him. Mr. Soloso is in Florida and will be there for a period of time. Rather than leave the subpoena at Kennedy Airport, the subpoena was then brought to the Immigration headquarters building in the city, the World Trade Center and it was turned over to Mr. Baris. From the little Mr. Baris told my investigator, he said there is a file concerning Mr. Buhler and that had been inquired of by Mr. Levine and Mr. Reynard. What customs declaration might there be or not, and so forth, Mr. Baris would not say.

In order we might expedite matters without my

issuing more subpoenas and sending out more checks for $22, that if it is possible, Mr. Levine make that informatio available to opposing counsel now, so we can see if we wish to subpoena the individual, or if we can stipulate what the individual's testimony would be or whether or not in fact there is nothing in value in the whole matter and therefore it can be dropped.

MR. LEVINE: Your Honor, the government has been in contact by Mr. Baris and I have a copy of the subpoena. I think the fact that the defendants are looking for, the government has now found out the informatio last night at 8 o'clock. The government was informed by customs agent in New York that the check of the Los Angeles customs declaration for the flight and time of Mr. Buhler indicated a short form customs declaration with the name and address and stay of Mr. Buhler on the front, and no statement of importation of any jewelry or anything of value, with a signature on the back.

The government has prepared to so stipulate on the record that that is the fact. The document is being flown here, sent here, and will be here on Tuesday. A telex facs of that document will be here tomorrow or today, I think. I would think that would satisfy the defendants.

With respect to other material included on this

subpoena, I have been advised that the government will not respond right now as to whether or not it would comply or whether it would have to move to quash but I think that the information I have just given satisfies, I think, the defendants and what they were looking for.

MR. GOLDBERG: It satisfies the defendant Kaminsky.

MR. MITCHELL: Your Honor, that's only on Los Angeles. What about the New York entry in June of 1974. Have you found anything on that?

MR. LEVINE: No.

MR. GOLDBERG: Can we check that out, through the court, your Honor-- we can address him directly but can he check the New York customs.

THE COURT: He can if he wants. I think you've got it all.

MR. LEVINE: That is most difficult because what you need in order to check these items is the flight, date and time of arrival and we don't have that information for the June trip. The government submits that is merely cumulative or whatever.

MR. MITCHELL: Will the government stipulate that he made no declaration in June?

MR. LEVINE: No. The government would not stipulate

to anything it has no knowledge of.

MR. GOLDBERG: We can take it on the absence of the government to p oduce the customs declaration for that flight, I take it, we can comment on the failure to produce that.

THE COURT: I suppose it is in their possession if it exists.

MR. GOLDBERG: The second part is satisfactory.

THE COURT: I will instruct the jury that only goes to his credibility and the fact he may not have declare it doesn't mean he couldn't be swindled out of it.

MR. EPSTEIN: Judge I point out the subpoena calls for everything the government may have concerning Buhler's background and reputation of possibly being a smuggler. I certainly would want that material available on Tuesday, if it can be.

THE COURT: That part of the subpoena I think should be quashed. We can't conduct discovery throughout the entire trial. That's what the defendants are attemptin to do.

MR. EPSTEIN: I am not attempting to do that, Judge. The fact is, the defendants have no control over--

THE COURT: All right.

MR. EPSTEIN: I would ask before your Honor

at least in camera the material and then make a determinatic whether the subpoena should be--

THE COURT: What material?

MR. EPSTEIN: Concerning whether the customs service has a file on Buhler.

THE COURT: Where is the material?

MR. EPSTEIN: It is in the World Trade, your Hono

THE COURT: Why don't you subpoena it?

MR. EPSTEIN: It has been.

THE COURT: Maybe it will be produced.

MR. EPSTEIN: I am asking Judge, it be produced.

THE COURT: It is not in the government's possessi at this time, not in Mr. Levine's possession.

MR. LEVINE: That's correct, your Honor.

MR. EPSTEIN: It is a walk of three blocks, your Honor.

THE COURT: Yes,I know. We can get the U.S. Attorney to get your discovery for you.

MR. EPSTEIN: Mr. Baris wouldn't turn it over to me, Judge. He made that clear this morning. My investigator is strong enough to carry the file, he is over six feet, if the file would have been made available.

THE COURT: If it is necessary I will entertain a motion to quash the subpoena.

MR. LEVINE: Your Honor, I am not familiar with that area of the law. I will request an opportunity to confer with the Civil Division which handles some of the customs things. I think the turning over of that file raises at least questions of the Freedom of Information Act and the Privacy Act, apart from a whole litany of other problems. Even if the government does not move to quash it, the government would propose it be submitted in camera.

THE COURT: I think we have spent more time in the robing room in this case than trying the case.

MR. LEVINE: Your Honor, I would like to move to one other item. The government has the affidavit of Mr. Epstein on Mr. Barth. Your Honor, I have spoken to Mr. Barth this morning--

THE COURT: He never claimed that he purchased it from Mr. Barth. He has purchased it from some individual through Mr. Barth.

MR. LEVINE: That's correct, your Honor. That's what Mr. Buhler claims and Mr. Barth refuses to talk to me on the subject, refuses to get involves in the whole subject matter and turned the phone over to an employee of his, and when I explained that it was important that I have an opportunity to at least confirm some of the facts, he told me that Mr. Barth would not get involved and would

BEST COPY AVAILABLE

have nothing to do with it and indeed it phone was closed on my ear. The government submits that in order to get a continuance under these circumstances, to take the deposition of Mr. Barth, that the court ought to be provided with, number 1, a signed affidavit by Mr. Barth that he will indeed consent to being deposed and being subject to both direct and cross examination.

Number 2, that he consent to being deposed in Paris or some other city because it is the information of our office that such a deposition in the country of Switzerland is not lawful and we have put a call into the Justice Department in Washington to confirm that.

Third, that the defendants make an offer of proof on the record as to indeed what Mr. Barth would say.

Once the defendants have complied with all three of those qualifications, your Honor, then I think at that point the court could entertain the question of a continuance But, until that comes your Honor, we have no evidence that Mr. Barth will talk; we have no evidence what he would say and we have no evidence that he would subject himself to both direct and cross examination. It need not be pointed out that Mr. Barth is not subject to the subpoena power of the United States.

MR. EPSTEIN: Judge, very briefly I would like

to point out, I have set forth in my affidavit what I believe would constitute the substance of Mr. Barth's testimony as it relates to this case. As to whether or not Mr. Barth would consent to go to Paris of course that question I can't answer.

THE COURT: No claim has ever been made that Mr. Barth sold to Mr. Buhler a 9.88 carat diamond or any stone of that size.

The testimony is that he brought the seller and the buyer together.

MR. EPSTEIN: Brought them together as a broker to get a commission, your Honor.

THE COURT: It doesn't say he sold it.

MR. EPSTEIN: Mr. Barth's conversation was he had nothing to do with any such size stone.

THE COURT: You can comply with the conditions--

MR.EPSTEIN: Mr. Barth is a Swiss national and he is now in Zurich, Judge. In Switzerland there is no Fifth Amendment. Mr. Barth can be questioned this morning by the police, either to answer their questions or to continue for some time as their guest. He can be examined by the police in almost nothing flat and answer whatever questions Mr. Levine would propound to him by the Swiss police.

THE COURT: This matter is now closed.

MR. LEVINE: Two other matters, your Honor. The government is prepared this morning to introduce into evidence the prior conviction of the defendant Kaminsky and if the court will permit me, I will hand up a case, United States v. Eliano, 1975 Second Circuit-- I have it outside -- which supports the proposition that such a conviction can be introduced as evidence of a prior similar act.

MR. GOLDBERG: Without proving the event?

MR. LEVINE: That's correct.

MR. GOLDBERG: You have no intention of proving whether it was similar but just a conviction for grand larceny.

MR. LEVINE: And the supporting indictment which spells out, United States v. Eliano, and against Vario, Vilia and against Papadokus.

THE COURT: When was this conviction?

MR. LEVINE: 1969, your Honor, and the scheme is alleged as the identical scheme as proved in this-- that is a similar scheme, your Honor.

THE COURT: What were the time elements as far as the indictment in these other cases?

MR. GOLDBERG: '67. I represented him in the

MR. LEVINE: Your Honor, I think there ought to be a plan for this opening procedure. On behalf of the government, I have never seen this happen and the government is concerned that an opening by defense attorney under these circumstances comes not as an opening as to basically a proffer of what the defendant will prove in his or her particular case, but rather an introduction to the summation, number one, and number two, a comment on the government's case which naturally, in the traditional scheme of openings, would not be available.

THE COURT: The opening will not cover anything except what the defendant Kaminsky intends to prove in his case and if he were going to rest, the opening would consist of getting up and saying he is resting and you save your argument until summation.

MR. GOLDBERG: I said 'I will waive my opening. I will not open the door to inadvertence or mistake.

MR. EPSTEIN: Your Honor, in regard to opening on behalf of the defendant Benson, does your Honor intend to grant my application for continuance or not? Because if your Honor does, my situation is somewhat different regarding an opening as opposed --

THE COURT: For what purpose?

MR. EPSTEIN: If a continuance is to be granted,

to secure the testimony of Mr. Barth. Then I wouldn't make an opening at this time.

THE COURT: You have my ruling on Mr. Barth. I am not granting a continuance on the basis of the information that I presently have before me.

In the first place, the testimony shows all Mr. Barth would say, assuming he were willing to come here, would be that he did not sell the diamond and there is no claim that he did.

The testimony is that this was a private individual who made the sale and that Mr. Barth, if in this case, was the one who referred the seller to Mr. Buhler.

So, I don't think you have got such an inconsistency going to his credibility that would warrant a ten-minute continuance.

MR. LEVINE: Your Honor, there is one other matter and that is the government has heard from the defendant Kaminsky that its statement with respect to the importation document is sufficient and the government would like to get at least before the Court on the record, whether the defendant Benson Levine, Levine Benson and in the defendant Danise's view or position, constitutes satisfaction of their needs on this issue.

MR. GOLDBERG: When you get that Customs

hplt

declaration, Mr. Levine, if I so adhere to my stipulation, would you have any objection to it going into evidence?

MR. LEVINE: Absolutely not.

MR. GOLDBERG: That's satisfactory to me.

MR. EPSTEIN: On behalf of the defendant Harry Levine Benson, it is not satisfactory. It does not comply with the requests set forth in the subpoena.

MR. MITCHELL: Your Honor, until the entire case is in, I do not want to make any stipulation.

MR. LEVINE: Your Honor, if there is something outstanding that these defendants claim the government must produce, that they do not make known to the government and give the Court an opportunity to rule on prior to the end of the case --

THE COURT: The Court rules that the production of the Telex is sufficient compliance with the subpoena and quashes the subpoena.

MR. EPSTEIN: In view of the Court's ruling then, I would abide by the ruling and will be willing to accept the telex and have that go into evidence before the jury.

MR. LEVINE: Will the Court mark for identificati the subpoena that was served on the Bureau of Customs?

(Court's Exhibit 3 received.)

xxxx

MR. MITCHELL: I will go along with co-counsel, your Honor, but I would like to have the privilege of looking

hplt

at the actual document and to amend.

MR. GOLDBERG: We won't stipulate now until he gets the Telex.

MR. LEVINE: It has been represented to me that that is what the Telex will say, your Honor.

Your Honor, I am only a courier of information under these circumstances.

THE COURT: That will be introduced into evidence or be made available to the defendants and then introduced into evidence.

MR. LEVINE: The government will offer it, your Honor.

MR. MITCHELL: I am going to make a request of the government, through your Honor, as far as Buhler's arrival in the United States is concerned, according to the document, he arrived on June 14th. There is no question about it. It is stamped in his passport. He came from Switzerland

On that day there were only two planes in to the United States, or three at the most, and I think the government, over the weekend, should make an effort to locate his entry document.

THE COURT: All right, let's try the case.

MR. LEVINE: Your Honor, the government is prepared to read the stipulation to the jury and state with

the exception of one additional --

MR. GOLDBERG: The stipulation on Customs?

MR. LEVINE: No, on business records.

THE COURT: On the Customs, he is making availabl for your case or will produce the Customs statement which would indicate presumably that he didn't declare any diamond or anything of value.

MR. MITCHELL: Your Honor, may I inquire through the Court whether Mr. Levine would stipulate that on entry to the United States, every person must fill out a Customs declaration, except an infant in arms.

MR. LEVINE: Your Honor, the government sees no relevancy to such a stipulation.

MR. GOLDBERG: He will stipulate he filled one out.

THE COURT: He said that he had filled one out.

MR. LEVINE: You will get the declaration.

MR. MITCHELL: I am talking about the Kennedy Airport one in June.

THE COURT: Let's go on.

(In open court - jury present.)

MR. LEVINE: With the Court's permission, at this time the government would like to have marked for identification Government's Exhibits 36, 36A, 37, 38, 39,

SCHWEIZERISCHE KREDITANSTALT
CRÉDIT SUISSE · CREDITO SVIZZERO
SWISS CREDIT BANK
STADTFILIALE ZÜRICH-RATHAUSPLATZ

Telephon 051 / 47 14 00
Postcheck 80-2372
Telegramme KREDITEINS
Telex 53 5 63

8022 Zürich, 26. Juni 1974 Ca/hg

Ihr Auftrag vom
Votre ordre du
Your order dated 26.6.74

Wir übersenden/senden Ihnen die unten aufgeführten Checks
Nous remettons les chèques indiqués ci-après
We are sending the checks listed below

Adresse / Address

Herrn
H.H. Bühler
"Greenfire"
Rennweg 30

8001 Zürich

Order: H.H. Bühler "Greenfire"

No.	Betrag / Montant Amount	Platz / Place	Kurs / Cours / Rate		Total	Val.
849772	SFr 510,000.--	Zürich			Fr. 510,000.--	26.6.74

Verbucht
300103

ein Bankk / Fing Bi/9 90

wofür wir Sie wie vorstehend belasten.
dont nous vous débitons selon décompte ci-dessus.
for which we debit you as mentioned above.

Contr.:

Hochachtungsvoll / Vos dévoués / Yours very truly
SCHWEIZERISCHE KREDITANSTALT
CRÉDIT SUISSE · SWISS CREDIT BANK

Anzeige ohne Unterschrift / Avis sans signature / Not to be signed

1 № 22426 5 70

BEST COPY AVAILABLE

USA GOVERNMENT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

DEFENDANT'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

E - [illegible]

Hilton 1.1.75 A 183

[illegible]igned does hereby
[illegible]ees to James Brito, a
sum equal to 50% as Brito's share of the
commission on the sale of one 9.8 ct. diamond on
immediatly upon the undersigned's receipt of
his commission, ($15'000)
The undersigned does further authorize the seller
or other persons to pay directly to Brito his
share as above mentioned ($7500.-) and does
assign said sum to Brito. In the event the
seller or other persons pays to Brito the undersigned
share of the commission anything over $7500.- Brito
agrees immediatly to pay to the undersigned
that sums received by him over and above
his share of the commissions earned by the
undersigned.

H. Fürer

AGREED TO:

[illegible] 1/15

Gilt hier als Muster und befreit H. H. Brites
Hälfte davon, die Provision direkt an H. Fürer
zu zahlen

H. Fürer

Ex. plaintiff's #1
for I.D. 2/20/76
SF

FD-302 (Rev. 11-27-68)

FEDERAL BUREAU OF INVESTIGATION

A 134

Date of transcription 3/26/75

HANS BUHLER, Zurich Switzerland was contacted at the New York Office of the Federal Bureau of Investigation. After being advised of the official identity of the interviewing agent, BUHLER furnished the following:

BUHLER purchased a 9.90 carat blue white diamond with two flaws through a EDDIE BARTH, a Swiss National, of Barth Jewelry, Bahnhof Street, Zurich, in June of 1974. At that time, the diamond belonged to a West German client of BARTH's. This item is of legitimate origins which can be fully documented. Mr. ARI NAT, a Swiss National, Hohlstr 35, Zurich, telephone 236-154 is the half owner of this item. The other half belongs to HANS BUHLER.

This diamond was re-polished by SAM HOROWITZ, Horowitz and Goren, 2 West 47th Street, New York City, telephone 212-245-6464 on June 14, 1974. After polishing, the diamond was flawless and weighed 9.88 carats.

BUHLER can produce customs documents reflecting the lawful entry of this diamond from Switzerland to the United States.

BUHLER received an 8.35 carat emerald on consignment from HARNISH T. KOTHARI, Kothari Jewellers, 1, Shankar Mahal, Sophia College Road, Off Wardens Road, Bombay, 26, India. BUHLER furnished KOTHARI with a signed memorandum reflecting receipt of this item. KOTHARI transported the emerald to Zurich. BUHLER can produce full documentation reflecing the stones legitimate origins and customs papers reflecting its entry into the United States from Switzerland.

In December, 1974, BUHLER purchased a $10,000.00 trading check number 07315 in blank from EUVRA VERRECHNUNGS-AG, Zurich, Switzerland. This item is not a negotiable money item. When purchased it usually represents the future purchase of a quantity of a specific commodity such as diamonds.

On or about January 5, 1975, BUHLER showed the above

Interviewed on 3/25/75 at New York, New York File # NY 87-75109

by SA ERICK ALAN VAIL/dyc Date dictated 3/26/75

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

with the hope that the judge can cure it by limiting instructions because the Court recognizes, the Court of Appeals, how difficult it is for the jury and the judge to frame an effective --

THE COURT: All right.

(Mr. Buhler entered the robing room.)

MR. LEVINE: Your Honor, we will have to correct the address.

You have discussed this with your lawyer, Mr. Buhler?

MR. BUHLER: Yes.

THE COURT: Correct the address and then you could sign your name.

MR. EPSTEIN: Two signed will be sufficient.

THE COURT: I will keep the third and mark it as a Court Exhibit.

(Mr. Buhler left the robing room.)

(Court Exhibit 2 received.)

MR. GOLDBERG: Your Honor, I just want to point out that we have made no claim of mistake, so that we claim intent is not a critical issue in this case since we will not dispute, we will not go to the jury with an argument that we were mistaken. We will simply claim Kaminsky was not involved in the very transaction, seeking

hpas5

no interpretation other than he was not involved at all in the transaction. In addition, I ask your Honor to assess the government's need for such proof on its direct case and I suggest to you that in Byrd, the Court of Appeals suggested if this proof were relevant, it ought to come in perhaps on the government's rebuttal case, and after you determine what are the real contested issues in this case. I just don't think that you get proof like this in simply because it's similar with a statement --

THE COURT: If the jury finds that he participated, then his intent and wilfulness become issues. I can instruct them and probably will instruct them that they do not consider this evidence against him until they have found all of the other elements of the crime and having found those elements of the crime, then they may consider this evidence solely against the particular individual involved. But, they may not consider this evidence in any way in determining the other elements of the crime.

MR. GOLDBERG: You have made your ruling, Judge, but my final statement is, intent in every criminal case is relevant and is an essential element normally in a criminal case. If that is the way in which proof comes in, similar proof, because it's relevant to the issue of intent, you're really saying in every single criminal case proof of

hpas6

similar acts ought to be admitted and I am suggesting to your Honor that by the nature of it being a criminal case, of course intent is an element, but --

THE COURT: And wilfulness.

MR. GOLDBERG: Yes, but not an element about which there is any contest on the part of Kaminsky and I suggest to your Honor if you are admitting this because it is relevant to intent, with that statement --

THE COURT: Wilfulness, not necessarily intent.

MR. GOLDBERG: All right, wilfulness, your Honor, then in effect you are saying since this is a criminal case, it would apply in every single criminal case because in every case don't you have issues of intent and wilfulness? You must ask yourself, most respectfully, whether there is any real contest in this case, bottomed on the claim that the defendant Kaminsky acted unknowingly or by mistake or without a guilty intention on his part, or whether the defense is not that Kaminsky was not involved at all in the transactions. I submit under the latter defense, which is our defense, this proof is not relevant on the issue of intent and wilfulness because there is no real contested issue on that score and you must assess the government's need for such proof in the light of the defense.

hpas7

It seems to me, your Honor, that when Mr. Levine gets up and says that this is the identical same scheme, that poses a greater risk that this jury is going to misunderstand the nature of this proof and I really ask your Honor whether you have heard the government's proof so far, is it necessary, is it really needed by the government, does the government have to inject into the case a possible area of error, should they prevail in this case.

What is the government's need? You've got Buhler testifying; the defendant will not take the stand. Why must it be injected into the case?

THE COURT: Why don't we give Mr. Levine a chance?

MR. LEVINE: Your Honor, I've been taught once you get a ruling, you keep your mouth shut.

THE COURT: I sometimes change my rulings. I'm easily persuaded.

MR. LEVINE: First, the record should reflect that the acts that the government will prove do not relate to the government's comment that they are identically similar, so the record ought to reflect that.

Secondly, when the main issue, it seems to the government, as raised by the brief, is a wilfulness issue and that is, given what Kaminsky did, did he have an aware-

ness of wrongdoing, of his wrongdoing. It appears that defendant Kaminsky will not challenge his acts in this case, and the jury should be permitted to infer on the basis of both prior -- which the government will not be able to prove -- and subsequent similar acts that the defendant in similar circumstances, as a result of similar circumstances had an awareness of wrongdoing, i.e., proof of the wilfulness element, and the conduct --

THE COURT: You are talking about his prior conviction?

MR. LEVINE: No, your Honor. I am talking about the subsequent similar acts which will show the defendant Kaminsky engaged in similar schemes, with similar type of participation which will be probative of his wilfulness in this case.

THE COURT: I could see why something he had some in the past was similar in nature and ended up in his being prosecuted for a crime would be some evidence of wilfulness for some subsequent similar act that showed he at least knew he was doing something wrong. But does the fact that at a later date, some years later, he gets into this transaction in Connecticut, indicate that he had wilful knowledge some years ago? I am not talking about intent now. Wilfulness.

hpas9

MR. LEVINE: Your Honor, the government will introduce proof that the facts as alleged in the indictment occurred in December '74 and January '75, and the two subsequent similar acts that the government will offer, one involving a jewel transaction and one involving antifreeze, both took place within, I think almost within six months of the acts alleged in the indictment and the law as cited in the Second Circuit is that subsequent similar acts within a reasonable period of time are also admissible as circumstantial evidence with a limiting instruction to the jury on the issues of intent and wilfulness, and the government submits particular in this case, where the facts as stated could be construed by someone as being a business transaction that went awry, and where the difficulty for the government to convince the jury that there actually was involved here a scheme to defraud, that the similar acts that the government offers are particularly probative for circumstantial evidence of their intent and wilfulness.

MR. GOLDBERG: When the government is talking, can't you substitute for "intent" and "wilfulness," "criminal character"? What they are saying really is, they want to show he perpetrated for other jewel --

THE COURT: The jury will be instructed that they cannot.

UNITED STATES OF AMERICA

v.

HARRY LEVINE BENSON, et al.

May 28, 1976,
11:20 A.M.

--

(In the robing room)

MR. GOLDBERG: Your Honor, the defendant Kaminsky requests an instruction that on the Pollak transaction the jury should be instructed that the defendant has not been arrested, indicted or convicted of that offense. I think in fairness, the jury get the impression that this is in effect a conviction and why shouldn't the record be straightened out as a matter of judicial notice in fairness to the defendant.

MR. LEVINE: Your Honor, I think the Court's instruction to the jury prior to the testimony of Mr. Pollak was adequate. I have never heard of such an instruction given on a similar act and I don't think it is necessary.

MR. GOLDBERG: Your Honor, in candor, I don't know that I have heard of it either.

THE COURT: Application is denied.

MR. GOLDBERG: May I finish my sentence, your Honor. I don't say that I have heard of it either but I do press it as appropriate nonetheless.

request is charged.

The second, third, fourth, fifth and sixth are charged in substance.

There was a request, number 7, for absence of witness or failure to call a witness. It will be charged.

The 8th is charged in substance.

There were no requests from the defendants Danise or Kaminsky.

MR. GOLDBERGER: Your Honor, at the end of the entire case the defendant Kaminsky was and renews his Rule 29 motion.

THE COURT: And I assume that's done on behalf of all defendants?

MR. MITCHELL: Yes.

MR. EPSTEIN: Your Honor, as to the defendant Benson, specifically there are two grounds we would urge upon the Court.

THE COURT: Yes?

MR. EPSTEIN: In view of the stipulation which the government has just read to the jury, it appears there is no reason to believe or no proof beyond a reasonable doubt that Hans Buhler was, in fact, the true owner of the property described in this indictment, namely, the diamond and the emerald.

It is our contention that under the laws enacted by Congress which is before the jury in this case that unless one can be shown to be either the true owner or the possessor with the full knowledge and authority of the true owner, that one does not come within the protection which these laws have set forth, and that therefore there is no matter in this case to go before the grand jury, as it has not been shown by proof beyond a reasonable doubt that Buhler is the true owner of this property.

THE COURT: Next?

MR. EPSTEIN: Secondly, your Honor, concerning the proceedings before the grand jury, Government's Exhibit 3501, which is the grand jury minutes of January 10, 1974, shows that all this material was submitted to a grand jury on April 25th of 1975 which, to the best of my knowledge, did not return an indictment in this matter, and I would seek to inquire of the government through the court as to exactly what transpired before the April grand jury as to whether or not they voted no true bill and as to exactly what material that was presented to the April grand jury was either added to or deleted from the presentation that was made to the grand jury in June of --

THE COURT: This is not an appropriate Rule 29 motion.

slh

MR. EPSTEIN: I would submit that it is, your Honor, at this time, especially at this time.

THE COURT: The motions are denied.

MR. EPSTEIN:I respectfully except.

THE COURT: All right, we will take a couple of minutes and we will bring the jury back.

I hope you are not all going to take an hour each.

MR. EPSTEIN: Excuse me, your Honor, with your Honor's permission, counsel have agreed among themselves as to the following order of summations: Mr. Goldberg will be first, Mr. Mitchell second and I will be third.

THE COURT: It sounds like a good lineup, but I hope brevit will prevail, but I have my doubts.

(Recess)

Take 1B p.m

hplt

Finally, Hans Buhler went to Las Vegas where the defendants Harry Levine Benson, Herbert Kaminsky and Mari-Ann Danise promised him he would get the money from the defendant Harry Levine Benson.

But that was also a misrepresentation. He never received the money and he never received the jewels back.

Now, you may be asking yourself, why should you believe Hans Buhler?

You will hear that Mr. Buhler doesn't have an unblemished record himself. There are dishonest things that he has done. But, ladies and gentlemen, those were Mr. Buhler's stones, and he was there. And, the government will prove beyond any question that he was the legitimate owner of those two very valuable jewels and that these three defendants on trial here before you obtained those two gems from him without any intention of paying for them. That is, obtained them from him by fraud.

But, why should you believe him? You should because, ladies and gentlemen, it will not just be Hans Buhler against these three defendants.

I told you there were three steps in the government's proof and that brings us to step number two:

Step number two, ladies and gentlemen, you will see extensive records and documents which were collected

hplt 2

defendant Danise introduced the defendant Herbert Kaminsky as Herbie, and then told Buhler later his name was Herbie Ky, not Kaminsky, to the last minute, when the witness Hans Buhler went to Las Vegas to pick up his money but the money wasn't there. From start to finish. Every step of the way was fraud, ladies and gentlemen.

Now, the government told you in its opening that Hans Buhler was not an honorable man. They told you he had a criminal record and indeed he did, ladies and gentlemen, and you heard him testify about it. And you also heard about the other dishonorable things he has done in his life and you also heard that he didn't even register that diamond and that emerald when he came in to Los Angeles on December 12th. But, ladies and gentlemen, the government submits that the documents support Buhler each step of the way and that this case is about the emerald and the diamond, and that's what you have to concentrate on.

The government submits that all you have to find about Mr. Buhler is two things:

One, that he owned those stones and; two, that these defendants took them away.

Now, a lot of conversation was made in cross examination about who owned those stones, ladies and gentlemen, and the government wants to hit that straight on. Let's talk

hplt 3

about who owned those stones.

Ladies and gentlemen, the government submits that no fewer than six documents established the witness Hans Buhler's ownership of those stones. Government's Exhibit 4 in evidence, the bank draft for 510 Swiss francs, and on cross examination you heard Buhler identify the penciled writing on that document as his own, and tell defense counsel that "D.I." stood for diamond and 9.90 was the karat and the 510 francs was what was spent for that diamond.

Then you saw later on the bank records put into evidence, ladies and gentlemen, which showed that on the 22nd of June 510 francs came out of the witness Buhler's account which represented this bank draft, ladies and gentlemen, and that the day before 260,000 francs had gone in which was his partner's share for the two stones. So that is the purchase of the diamond, ladies and gentlemen.

What about the purchase of the emerald? You have got the receipt right here, signed by Hans Buhler, 8.35 karat emerald, Kuthary Jewelers in Bombay. That is the ownership of the emerald.

But, that's not all ladies and gentlemen. I told you there were six documents and that's three.

Hans Buhler leaves Switzerland to go to L.A. What does he do? He makes a declaration to his Customs about

hplt 4

the items of value he is taking out, an official document, ladies and gentlemen, and you can take this into the jury room and look at it also.

Right up there, number one, 8.35 karat emerald and number four, 9.88 karat diamond, with the value and the amounts all set forth for the Swiss Customs. That's document number 4.

Document number 5 and document number 6, ladies and gentlemen, are the two certificates from the Gemological Institute of America. I cannot find the second one. Here is the Los Angeles document, ladies and gentlemen, describing it with the color "E" and that's the copy that Hans Buhler had that he identified here in the courtroom. And the other one, ladies and gentlemen, was the document that Mr. Crowningshield brought here himself, Government's Exhibit 2 in evidence which Hans Buhler signed and Mr. Crowningshield said he could identify Hans Buhler's signature.

The difference in these two, ladies and gentlemen? Obvious. The GIA certificate in New York has a color "F", and the GIA certificate in Los Angeles has obviously the color "E".

So, those are the six documents, ladies and gentlemen, that show Hans Buhler's possession and ownership of those two stones.

hplt 5

But that's not all, ladies and gentlemen. There are other documents that show Hans Buhler's possession of those two stones. And, where do they come from? They come from the pen of the defendant Mari-Ann Danise. So what is this issue anyway? You just take Government's Exhibit 20 into the witness room with you:

"I, Mari-Ann Danise, representing Chaos, Ltd., have agreed the following payments for the 9.88 gem diamond and the 8.35 emerald."

Just drawing numbers out of the sky, diamonds out of thesky for some other kind of business transaction?

LAdies and gentlemen, there is no question, based on this document, what is involved here:

The 9.88 diamond and the 8.35 emerald.

So, those are the eight documents, ladies and gentlemen, that prove Hans Buhler's possession of those two stones. So, that is his ownership and possession.

Now, what else is there? Where is the proof, ladies and gentlemen, that the defendants took them? Ladies and gentlemen, don't go far. Go right back to Government's Exhibit 20. The guarantee specifically spells out the stone, names the defendant Harry Levine Benson and signed by the defendant Mari-Ann Danise. And also, don't go too much further, ladies and gentlemen, than Government's Exhibit 13,

COPY FURNISHED
ROBERT B. FISKE JR.
NOV 19 1970
BOARD OF ELECTIONS
SO. DIST. OF N.Y.